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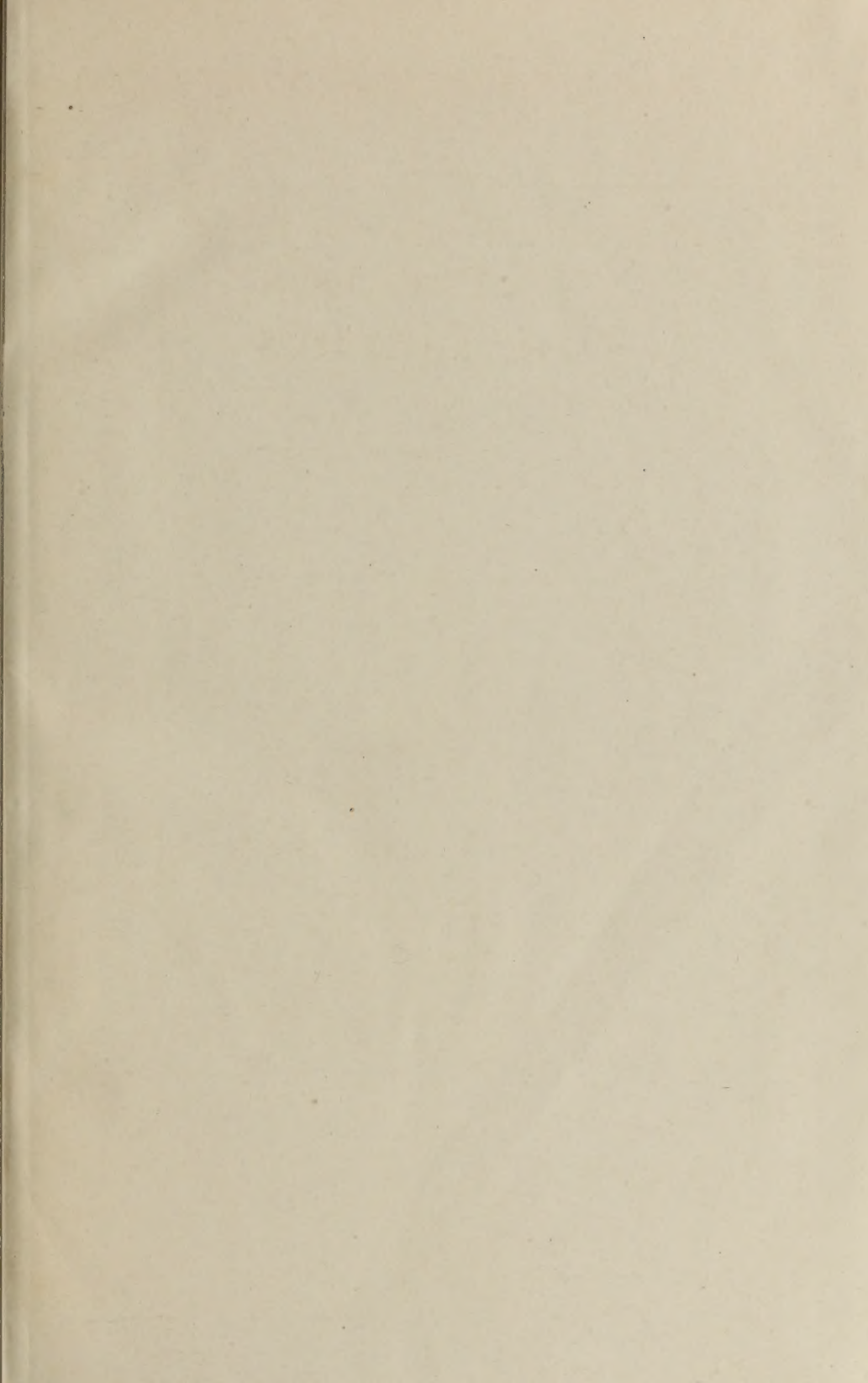
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**United States Circuit Court
of Appeals**
For the Ninth Circuit

MAX WOLF
Plaintiff in Error

vs.

J. M. EDMUNSON and M. J. EDMUNSON
Defendants in Error

Transcript of Record

**Upon Writ of Error to the District Court of the
United States for the District of Oregon**

Filed

AUG 28 1916

F. D. Monckton,
Clerk.

United States Circuit Court of Appeals

For the Ninth Circuit

MAX WOLF
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**In the District Court of the United States
For the District of Oregon**

MAX WOLF,

Plaintiff,

vs.

J. M. EDMUNSON AND M. J. EDMUNSON,

Defendants.

MARCH TERM, 1915

Be it remembered, that on the 19th day of June, 1915, there was duly filed in the District Court of the United States for the District of Oregon a complaint by the plaintiff herein, and a summons was duly issued thereon and placed in the hands of the United States Marshal for service, and the same was duly returned and filed on the 23rd day of June, 1915, with the endorsement of said Marshal thereon, showing due service upon each of the defendants herein on the 21st day of June, 1915; that thereafter on the 13th day of September, 1915, plaintiff filed his amended complaint herein in words and figures as follows, to-wit:

COMPLAINT

(Title omitted.)

Plaintiff, for cause of action, in his amended complaint, alleges the following facts:

1. That Max Wolf is a citizen of the City and County of San Francisco, California, and is residing therein.

2. That the defendants, J. M. Edmunson and M. J. Edmunson are citizens of Lane County, Oregon, and are both residing therein.

3. That Marcus J. Netter and Max Wolf were and at all times alleged herein partners doing business under the firm name and style of Klaber, Wolf & Netter.

4. That on the 29th day of May, 1912, the said firm of Klaber, Wolf & Netter and the defendants entered into a written contract whereby the defendants agreed to sell and the said firm of Klaber, Wolf & Netter agreed to buy thirty thousand (30,000) pounds of hops, net weight, of the crop of hops to be grown in the year 1912 by the defendants on the farm owned by Mrs. M. J. Edmunson, and known as the Edmunson farm, situate about one mile east of Goshen, in the County of Lane and State of Oregon, and consisting of one hundred acres, and upon which land there was under cultivation thirty acres, more or less, of hops.

5. That the defendants agreed to cultivate, carefully spray, cleanly pick, properly dry, cure and bale and prepare for market all of the said hops grown on the said premises in a good and husbandlike manner.

6. That it was provided in said contract, that all of said hops were to be of first quality, that is, sound condition, good and even color, fully matured, but not over-ript, flakey, cleanly picked, properly dried and cured, free from sweepings and other for-

eign matter, and not affected by spraying or vermin damage, and should not be the product of a first year's planting.

7. That the said Klaber, Wolf & Netter agreed to pay to the defendants at the rate of twenty-five cents per pound for the said hops when delivered in accordance with the terms of said agreement. That said hops were to be delivered to the said Klaber, Wolf & Netter free from all liens or encumbrances of whatsoever kind and nature, on the cars or in the warehouse at Goshen, Oregon, between October 1st, 1912, and October 31st, 1912.

8. It was further agreed that said Klaber, Wolf & Netter should advance under the said contract, as part payment for the said hops, the sum of \$1,200.00 on or about May 31st, 1912, and \$1,800.00 on or about September 1st, 1912, that pursuant to the said contract the said Klaber, Wolf & Netter did on the 1st day of May, 1912, advance to the said defendants the sum of \$1,200.00, and on the 31st day of August, 1912, did advance the said sum of \$1,800.00, as said part payment on said hops.

9. And it was further agreed that if in the indement of said Klaber, Wolf & Netter the quality of all or of any portion of the hops tendered under the said contract by said defendants should be inferior from any cause whatever, to the quality of hops specified in said agreement, it should be the duty of the defendants to tender to the said Klaber, Wolf & Netter the said hops raised, and the said Klaber,

Wolf & Netter might have the right of accepting the entire quantity contracted for or any portion less than the entire quantity contracted for a reduction in price, which reduction should be equal to the difference in the market value of the said hops tendered under the contract and the market value of such hops at the time of the execution of the contract.

10. That during the month of October, 1912, the said Klaber, Wolf & Netter received samples from the hops grown upon the said premises during the said year 1912, and finding them of inferior quality and not according to the specifications contained in the said contract, said Klaber, Wolf & Netter, on the 30th day of October, 1912, inspected the said hops fully and completely and found them slack dried, bad and uneven in color, of unsound condition, not fully matured, not cleanly picked, not properly dried or cured, and affected by vermin damage, whereupon the said Klaber, Wolf & Netter rejected the said hops as first quality hops as defined by said contract and said defendants refused to tender the said hops to the said Klaber, Wolf & Netter at any reduction in price, but refused to act any further under the said contract or comply with any of the terms or provisions thereof, and said defendants, without the knowledge or consent of said Klaber, Wolf & Netter, proceeded to and did sell the said hops to other parties in violation of their said contract.

Paragraph 11 stricken out by the Court.

Paragraph 12 stricken out by the Court.

13. That the defendants have failed, neglected and refused to repay the said sums aforesaid advanced to the defendant, but did not refuse to repay the same until after they had sold said hops, that the said sums became due upon the 30th day of October, 1912, with interest thereon from the date of said advances, and said Klaber, Wolf & Netter had demanded repayment thereof.

Paragraph 14 stricken out by the Court.

15. That the consideration for entering into the said contract between said Klaber, Wolf & Netter and defendants was the sum of One (\$1.00) Dollar, the receipt whereof was acknowledged by the said defendants in said contract.

Paragraph 16 stricken out by the Court.

Paragraph 17 stricken out by the Court.

18. That the said Marcus J. Netter is deceased, and his said last will and testament was duly admitted to probate in the Probate Court of the State of California in and for the City and County of San Francisco, of which state and county he was a citizen and resided therein, and all the right, title and interest that the said Marcus J. Netter had in and to the aforesaid claim against the defendants, was on the 28th day of February, 1914, duly assigned and transferred to this plaintiff, who is now the sole owner and holder of the said claims, as surviving

partner and for the purpose of distributing the proceeds thereof.

19. That by reason of the foregoing facts the defendants are indebted to plaintiff in the sum of \$1.00, the consideration for the said contract; \$1,200.00 with interest thereon from May 1st, 1912; \$1,800.00 with interest thereon from August 31st, 1912.

Wherefore, plaintiff demands judgment against said defendants for the sum of \$1.00; for the sum of \$1,200.00, with interest thereon from the 1st day of May, 1912; \$1,800.00, with interest from Aug. 31st, 1912; each at the rate of six per cent per annum, and for his costs and disbursements of action herein.

WILLIAMS & BEAN,
Attorneys for Plaintiff.

Verification omitted.

Said amended complaint contained an acknowledgment of service endorsed thereon by A. C. Woodcock, one of the attorneys for defendants.

That thereafter, on the 31st day of January, 1916, defendants filed their amended answer herein, in words and figures as follows, to-wit:

ANSWER

Title omitted.

Come now the defendants in the above entitled action, and by leave of the Court first had and obtained, file this their amended answer to the plain-

tiff's amended complaint, and admit, deny and allege as follows:

I.

The defendants admit paragraphs 1, 2, 3, 4, 5, 6, 7, 8, of said amended complaint.

II.

The defendants admit that the contract provided the provisions set out in paragraph 9 of said amended complaint.

III.

As to paragraph 10 of the amended complaint, these defendants deny that during the month of October, 1912, the said Klaber, Wolf & Netter received samples of the hops grown upon said premises during the said year of 1912, and finding them of inferior quality, or not of the specifications contained in said contract; said Klaber, Wolf & Netter, on the 30th day of October, 1912, inspected the hops fully or completely or found them slack dried, or at all, or uneven in color, or of unsound condition, or not fully matured, or not cleanly picked, or not properly dried or cured, or affected by vermin damage.

IV.

These defendants admit that the said Klaber, Wolf & Netter, through their representative, rejected said hops, and deny that the reason for the same was that they were not first quality hops as defined by the contract, and these defendants deny that they refused to tender the said hops to the said Klaber, Wolf & Netter at any reduction in price, or refused

to go any further under the said contract, or to comply with any of the terms and conditions thereof, or that said defendants, without the knowledge or consent of said Klaber, Wolf & Netter, proceeded to and did sell the said hops to other parties in violation of their said contract, or otherwise, except as hereinafter alleged.

V.

That these defendants deny all the allegations set forth in paragraph 14 of said amended complaint, except as hereinafter set forth.

VI.

In reference to paragraph 18 of said amended complaint, these defendants allege that they have no knowledge or information sufficient to form a belief as to whether or not the said Marcus J. Netter is deceased, or that his last will or testament was duly admitted to probate in the Probate Court of the State of California, in and for the City and County of San Francisco, or that he was a citizen of such state and county and resided therein, or that all the right, title and interest that the said Marcus J. Netter in said claim against the defendants was on the . . . day of . . . , 1914, duly or at all assigned or transferred to the plaintiff, or that the plaintiff is now the owner or holder of said claim.

VII.

As to paragraph 19, these defendants deny that for any reason the defendants are indebted to plaintiff in the sum of One Dollar for the consideration

for the said contract, or \$1,200.00 and interest thereon from May 1st, 1912, or in any sum, or for \$1,800.00 and interest thereon from August 31st, 1912, or for any sum.

VIII.

These defendants admit that on the 29th day of May, 1912, the firm of Klaber, Wolf & Netter and the defendants entered into a written contract for the purchase by the said firm and the sale by the said defendants of hops to be raised on the lands described in the contract, a copy of which contract is hereunto annexed, and for greater certainty made a part of this answer.

That after the execution of said contract the defendants proceeded in a careful manner to cultivate the hops on the lands described in said contract, and proceeded to pick said hops and bale the same in a husbandlike manner, and the defendants did everything that could be done under the circumstances.

That the defendants did everything necessary to be done to cure said hops and bale the same ready for market.

IX.

The defendants admit that the firm of Klaber, Wolf & Netter advanced the money alleged to have been advanced.

That the contract price of said hops was twenty-five (25) cents per pound.

That at the time said hops were ready to be delivered to the purchasers, the price had gone down

at least ten (10) cents per pound below the contract price.

X.

That the said purchasers proceeded as hereinafter alleged to abandon said contract in various ways and ignore the same and endeavored to violate the contract absolutely in this: that on or about the 5th day of October, 1912, the purchasers, through their agents, made a pretended inspection of said hops.

That the defendants had raised on said yard about forty thousand (40,000) pounds of hops, all of which were stored in the warehouse in Goshen, Oregon, as specified in said contract, and the said purchasers, in making their first inspection of said hops, took out only two samples from two bales, and did not examine any of the rest of said hops in said warehouse, and at that time the said purchasers notified the defendants that they had rejected the hops and would not take them in under any conditions whatever, and requested the defendants to sell the hops to other parties.

That condition of affairs existed until the 31st day of October, 1912, being the date mentioned in the contract when the contract was to expire, then the said purchasers, carrying out their pretense, and acting in bad faith, made another pretended inspection of said hops and again notified the defendants that they rejected the whole of the hops and would not take them under any conditions whatever.

These defendants allege the facts to be, that they

have complied with all the terms and conditions of the contract entered into between them and the said purchasers, and allege the facts to be as herein alleged that the said purchasers never at any time acted in good faith and endeavored, attempted and did abandon their contract on the sole ground that the market price of hops was much lower than the contract price of hops mentioned in the contract, and these defendants further allege that they had enough hops of the quality required under the contract to fulfill the contract, and that the defendants were at all times ready and able to deliver said hops to the said purchasers and were willing to do so at any time during the life of said contract if the said purchasers had not refused to take said hops, and referring to the allegation in the complaint that the defendants sold the hops and shipped them out of the State of Oregon, the defendants allege that the hops were not sold until March, 1913, and were held in the warehouse until that time without any incumbrance whatever, except as the purchasers might have claimed as the purchasers at all times well knew.

XI.

That all the hops referred to herein were raised on the premises described in the contract.

Defendants, for a further and separate answer and defense to plaintiff's amended complaint, and by way of counter-claim thereto, allege as follows:

I.

That on the 29th day of May, 1912, the defendants entered into a written contract with Klaber, Wolf & Netter for the purchase by them and the raising, cultivating and production of 30,000 pounds of hops on defendants' farm in the year 1912, and the sale of said hops by the defendants to said partnership, said hops to be raised on the lands described in the contract, a copy of which is hereunto annexed, marked Exhibit "A," and for greater certainty made a part of this amended answer, which contract is the same contract mentioned in the complaint.

II.

That the defendants, in the year 1912, raised on said yard about 40,000 pounds of hops, all of which were picked, dried and baled according to the terms of said contract and stored in the warehouse in Goshen, Oregon, on and between the 1st and the 31st day of October, 1912, and the defendants tendered said hops to said partnership on and between said dates at said place, and defendants allege that said hops contained more than 30,000 pounds of hops of the quality described in said contract. That said partnership pretended to inspect and examine said hops on or about the 3rd day of October, 1912, but they inspected only two bales thereof and did not examine any of the rest of said hops in said warehouse, and at that time the said partnership notified the defendants that they had rejected the hops and would not take them under any condition whatso-

ever and requested defendants to sell said hops to other parties, and thereupon said partnership, without any right and against the terms of said contract, demanded of the defendants the repayment of the advances made for the cultivation and picking of said hops.

III.

That said partnership made no further inspection of said hops until on or about the 31st day of October, 1912, when said partnership, not acting in good faith but merely pretending to inspect said hops, examined the same and wrongfully notified defendants that they rejected all of the hops so grown by the defendants and notified defendants that they would not take them under any conditions whatsoever and again demanded of the defendants the repayment of the said advances.

IV.

Defendants allege that they have complied with all the terms and conditions of the said contract entered into between them and the said partnership and that the said purchasers never at any time acted in good faith in the inspection and examination of said hops, but at all times intended to and did abandon their said contract for the sole reason that the market price of hops at the time of said tender and inspection was about sixteen (16c) cents per pound for the quality of hops described in said contract, whereas the contract price therefor, agreed to be paid by said partnership to the defendants was the

sum of twenty-five (25c) cents per pound, and these defendants allege that they had enough hops of said crop of the quality required under the contract to fulfill the terms thereof and that the defendants were at all times ready, able and willing to deliver said hops to said purchasers and were willing to do so at any time during the life of said contract if the said purchasers had not refused to take said hops; and referring to the allegation in the complaint that the defendants sold the hops and shipped them out of the State of Oregon, the defendants allege that the hops were not sold until March, 1913, and were held in the said warehouse until that time without any incumbrances whatever, except as the said purchasers might have claimed, as they at all times well knew.

V.

That the defendants, on or about the 12th day of March, 1913, were compelled to and did sell said hops at the average price of about twelve (12c) cents per pound, which was the reasonable market value of said hops in Lane County, Oregon, where said hops were raised, being such hops as are mentioned in the contract between said parties, and by reason thereof the defendants suffered a loss amounting \$3,900.00, all of which was caused on account of the said purchasers not complying with their said contract, and these defendants demand that the said damages amounting to \$3,900.00 be counter-claimed and offset against any sum that the plaintiff might

be adjudged to be entitled to recover from the defendants on account of said contract.

Defense based on arbitration clause omitted.

Wherefore, Said defendants demand judgment against the said purchasers and against their said alleged assignee for the sum of \$3,900.00 damages for the breach of said contract by the said purchasers and that the same be offset against the amount of said advances made to the defendants under said contract, and that the defendants have and recover of and from the plaintiff the excess of said damages, amounting to \$900.00, and for their costs and disbursements of this action.

WOODCOCK, SMITH & BRYSON,
and
MANNING, SLATER & LEONARD,
Attorneys for Defendants.

Verification omitted.

EXHIBIT "A"

Date. THIS INDENTURE, made and entered into this 29th day of May, 1912,

Parties to Agreement. between J. M. Edmunson and Mrs. M. J. Edmunson, by occupation farmers, of Goshen, County of Lane, State of Oregon, hereinafter called the seller, and KLABER, WOLF & NETTER, of Portland, Oregon, County of Multnomah, State of Oregon, hereinafter called the buyer.

Consideration. WITNESSETH, In consideration of the sum of One Dollar (\$1.00) paid to said

Seller by said Buyer at the time of the execution of this Agreement, the receipt whereof is hereby acknowledged, and of the further covenants and agreements herein contained on the part of both parties to this agreement.

Sale. The Seller has bargained and agreed to sell and by these presents does hereby sell, and the Buyer has bargained and agreed to purchase and by these presents does hereby purchase the following described personal property, to-wit:

Quantity. Thirty Thousand (30,000 lbs.) pounds (net weight) of his crop of hops of the growth of the year 1912.

Description of Realty.—Omitted.

Quality. The said Seller hereby agrees to cultivate, carefully spray, cleanly pick, properly dry, cure and bale and prepare for market all of the said hops grown on the above described property, in a good and husbandlike manner. (The said hops covered by this instrument shall be of first quality, i. e., of sound condition, good and even color, fully matured, but not over-ripe, flaky, cleanly picked, properly dried and cured, and free from sweepings and other foreign matter, and not affected by spraying or vermin damage. Said hops shall not be the product of a first year's planting.)

Baling. Said hops are to be put up in bales of 185 lbs. to 210 lbs. gross weight each, in new twenty-four (24) ounce baling cloth.

Tare. The tare to be deducted from the weight of each bale shall be five (5) pounds.

Price. The said Buyer hereby agrees to pay to the said Seller at the rate of Twenty-five cents per pound (25 cts.) for the hops above sold when delivered in accordance with the specific terms of this agreement.

Advances. The said Buyer hereby agrees to advance to said Seller, as part payments under this contract, upon ten days request therefor in writing, the following sums:

Twelve Hundred dollars (\$1,200.00) on or about May 31, 1912.

.....dollars (\$.....) on or about
....., 190..., and

Eighteen Hundred dollars (\$1,800.00) on or about Sep. 1st, 1912,

as actually required for picking purposes. The said Buyer hereby agrees to make all advances under this contract by check, currency, or U. S. coin, at his office or at the office of his authorized agent. The said Seller hereby agrees to call for and accept the advances to be made under this agreement, as hereinbefore specified, at the office of the Buyer or his authorized agent.

Inspection. The said Buyer shall have the privilege of inspecting all of the said hops grown by the said Seller upon the above described property, either on the farm of the said Seller or at any place the

said hops may be stored or located, and selecting therefrom the quantity sold under this contract.

Delivery. The said Seller hereby agrees to serve written notice of his intention to deliver said hops to the said Buyer or his authorized agent, executors, administrators or assigns at least fifteen (15) days before the day on which he proposes to tender the said hops sold under this agreement for inspection and delivery, which said notice shall be personally served upon the said Buyer or his authorized agent. The said Seller also agrees that this notice for inspection and delivery shall not be served upon said Buyer until such time that all of the hops grown by the said Seller shall be baled and in shipping condition. It is also agreed by the parties to this instrument that the said Seller shall not tender any part of his crop of hops for inspection or delivery on any other sales or contracts until the hops sold under this agreement shall have been delivered; it being expressly understood and agreed by the parties to this instrument that this contract shall have preference, both as to quality and quantity, over all other contracts or sales in relation to said growth of hops.

The said Seller hereby agrees to deliver or cause to be delivered unto the said Buyer, or his authorized agent, executors, administrators or assigns, all of the hops accepted under this agreement free of and discharged of all liens and encumbrances of whatsoever kind and nature, on cars or in warehouse at Goshen, Ore., between Oct. 1st, 1912, and Oct. 31st, 1912. All

of said hops shall be delivered in lots of not less than entire lot bales, f. o. b. cars or warehouse, as the Buyer may elect.

Interest. It is agreed between the parties to this contract that all advances made hereunder shall bear interest from the date of the acceptance thereof, and shall be at the rate of per cent per annum.

Balance of Payments. The Buyer hereby agrees to pay the Seller the amount due under this contract, less advances made hereunder, and interest thereon, providing the quality and quantity are in strict accordance with the terms of this contract, and when said hops have been accepted by and delivered to the said Buyer, and after all of the other conditions named herein shall have been accomplished.

Insurance. (Omitted.)

Inferior Quality. If in the judgment of the said Buyer the quality of all or any portion of the hops tendered under this contract by said Seller should be inferior, from any cause whatever, to the quality of hops above specifically called for, it shall be the duty of the Seller to tender to said Buyer the said hops raised, and the said Buyer may have the right of accepting the entire quantity contracted for, or any part less than the entire quantity contracted for at a reduction in price, which reduction shall be equal to the difference between the market value of such hops tendered under this contract by said Seller and the market value of such hops at the time of the ex-

ention of this contract as are herein specifically called for to be delivered.

Insufficient Quantity. If from any cause whatever the said Seller should deliver or tender for delivery a quantity of hops less than the quantity above contracted for, it shall be the duty of the Seller to tender to said Buyer the said hops raised, and the said Buyer may have the right of accepting the quantity tendered and shall be entitled to damages for the amount short delivered, which damage shall be equal to the difference in market value at the time of delivery of this contract between the quantity and quality above called for and the quantity and quality actually tendered or delivered.

Arbitration. (Omitted.)

Security. (Omitted.)

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands the day and year first above mentioned.

J. M. EDMUNSON, (Seal.)

M. J. EDMUNSON, (Seal.)

KLABER, WOLF & NETTER,

By A. R. ZELLER, (Seal.)

Witnessed by:

L. R. Edmunson.

C. M. Kissinger.

Nella Blade.

Acknowledgments omitted.

And thereafter, on March 17th, 1916, the plaintiff filed his reply herein in words and figures, as follows:

REPLY

(Title omitted.)

Plaintiff, for reply to the amended answer filed by the defendants herein, admit, deny and allege as follows:

Answering paragraph nine of the said answer, deny that at the time said hops were ready to be delivered to the purchaser, or at all, the price had gone down to at least 10c per pound below the contract price or any other sum below the contract price greater than 4c.

Deny each and every allegation contained in paragraph ten of the said answer except as otherwise alleged in the amended complaint.

Admit the allegations of paragraph eleven.

Plaintiff, replying to the further and separate answer and defense set out in the amended answer and by way of counter-claim thereto, admit the allegations of paragraph one thereof.

Admits that the defendants, in the year 1912, raised on the said yards about 40,000 pounds of hops and that they were picked, dried and baled and stored in a warehouse in Goshen, Oregon, on and between the first and thirty-first day of October, 1912, but denies that the same were picked, dried and baled according to the terms of said contract or at all or

otherwise, except as alleged in the amended complaint.

Denies each and every other allegation contained in paragraph two of the said amended answer.

Denies each and every allegation contained in paragraph three of the said further and separate answer.

Denies each and every allegation contained in paragraph four of said further and separate answer, except as admitted by the allegations of plaintiff's amended complaint.

Denies each and every allegation contained in paragraph five of said further and separate answer, except as otherwise stated and alleged in plaintiff's amended complaint.

Reply to answer based on arbitration clause omitted.

Wherefore, plaintiff having fully replied to the amended answer herein, prays for judgment as in his complaint asked for.

WILLIAMS & BEAN,

Attorneys for Plaintiff.

Verification omitted.

That thereafter the said cause came on for hearing in the said United States District Court for the State of Oregon, before the Honorable Charles E. Wolverton, Judge of said Court, and jury duly empaneled to try said cause, plaintiff appearing by his attorneys, John M. Williams and Louis E. Bean, and

the defendants by Mr. W. T. Slater of counsel, and the said cause proceeded from day to day until the 29th day of February, 1916, when the cause was submitted to the jury after argument by counsel and instructions by the Court, and upon said day the jury returned into Court the following verdict:

VERDICT

“We, the jury duly empaneled and sworn to try the above entitled action, find for the defendants in the sum of \$400.00.

“E. M. SIMONTON, Foreman.”

Which verdict was received by the Court and ordered to be filed and the following judgment entered thereon in the Journal of said Court:

JUDGMENT

“Whereupon, it is considered that said plaintiff take nothing by this action and that said defendants do have and recover of and from said plaintiff the sum of \$400.00, together with their costs and disbursements, taxed herein at \$64.80.”

And at said time the plaintiff was granted sixty (60) days in which to file a motion for a new trial herein.

That thereafter, on March 17th, 1916, the plaintiff filed his motion for a new trial herein as follows:

MOTION FOR NEW TRIAL

(Title omitted.)

Comes now the plaintiff in the above entitled cause and moves the Court to set aside the judgment and verdict herein and to grant the plaintiff a new trial on the grounds as follows:

First. That the verdict is against the evidence in this case.

Second. That there is no evidence in this case to sustain the verdict of the jury; that there was no evidence that there were thirty thousand pounds, or anywhere near that number of pounds of hops of the quality described in the contract, produced by Edmunson during the year 1912.

Other grounds omitted.

Respectfully submitted,

WILLIAMS & BEAN,

Attorneys for Plaintiff.

That on the 20th day of March, 1916, the said motion for new trial came up for hearing, plaintiff appearing by Mr. J. M. Williams, of counsel, and the defendant appearing by Mr. W. T. Slater, of counsel. The Court, after hearing the argument of counsel thereon, made the following order:

ORDER DENYING MOTION FOR NEW TRIAL

“It is hereby ordered and adjudged that said motion be and the same is hereby denied.”

And afterwards, on the 9th day of August, 1916, there was duly filed in said Court a petition for Writ of Error, and on the 10th day of August, 1916, there was filed an Undertaking for the prosecution of said Writ to effect, in the sum of \$500.00, signed by J. W. Seavey and Charles M. Werner as sureties, on said 10th day of August, 1916, a Writ of Error was duly issued and citation in regular form was duly issued by the Judge of said Court, and an acknowledgment of service endorsed thereon by W. T. Slater, of attorneys for the defendants, and on the said 9th day of August, 1916, there was duly filed in said Court an Assignment of Errors in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS

(Title of Court and Cause.)

Now comes Max Wolf, plaintiff in error, in the above numbered and entitled cause, and in connection with his petition for a Writ of Error in this cause, assigns the following errors, which plaintiff in error avers occurred on the trial thereof, and in the final disposition thereof, and upon which he relies to reverse the judgment entered herein as appears of record:

This action was brought by plaintiff to recover advances amounting to \$3,001.00 on a hop contract for the purchase of 30,000 pounds of hops of the defendant, during the season of 1912. The hops were to be of first quality, that is: sound condition, good and

even color, fully matured but not over-ripe, flaky, cleanly picked, properly dried and cured, free from sweepings and other foreign matter and not affected by spraying or vermin damage. That the defendants grew some 40,000 pounds of hops upon their premises, and upon inspection of the said hops plaintiff avers that they were found to be slack dried, bad and uneven in color, of unsound condition, not fully matured, not properly dried or cured, and affected by vermin damage. Plaintiff introduced numerous expert hop inspectors as witnesses, who gave testimony that the said hops, upon inspection, were of a bad and uneven color, of an unsound condition, not fully matured, not properly dried and cured, and that they were affected by vermin damage. The contest between the parties turns around these points.

I.

The Court committed error in permitting Ross H. Woods, one of the plaintiff's expert witnesses to answer the following question on cross examination, over the objection of plaintiff as follows: Said witness was testifying with reference to the color of the hops and was asked this question:

Q. What you men mean to get at is the general average of the crop?

Objected to as incompetent, irrelevant and immaterial, which objection was overruled by the Court, and to which plaintiff saved an exception.

The witness answered: Well, yes. There was some of them green in each sample and some of them

were ripe, mixed as you were talking a while ago about where those were dumped off the kiln floor.

II.

The Court committed error in permitting J. M. Edmunson, who was called as a witness in his own behalf, to answer the following question in attempting to discredit the inspection made by the plaintiff's experts:

Q. Now, what is your experience with hop inspectors as to their being uniform in their judgment as to the quality of hops?

Which question was objected to by plaintiff as incompetent, irrelevant and immaterial.

COURT:—I think that is an inquiry about the quality in effect of the hops. You may answer.

To which ruling the plaintiff duly saved an exception, which exception was allowed by the Court.

The witness answered: I find that they vary considerable, one will call a hop prime and the other medium, etc., they will vary as much as one grade and some vary two grades.

III.

The Court erred in permitting the defendant, J. M. Edmunson, to answer the following question, over the objection of the plaintiff:

Q. Now, what do you say as to whether at the time that Mr. Hinkle inspected these hops on the 31st day of October, that you had 30,000 pounds of hops there of the quality described in that contract?

To which question plaintiff objected as incompe-

tent, irrelevant and immaterial and as calling for a conclusion of the witness on this matter.

COURT:—He says he inspected the hops, he can give his judgment as to that amount; to which ruling of the Court the plaintiff duly excepted, which exception was allowed by the Court, and witness answered:

I considered that I had more than enough hops of the quality that would be sufficient, that would go on the contract. There was perhaps 50 bales or 60, between 50 and 60 bales, hops extra, besides enough. I had over 40,000 pounds according to my recollection, in the whole crop.

IV.

Bert Pilkington was called as a witness on behalf of the defendants, and after testifying to his qualifications as a chemist, as more fully shown hereafter in quotations from Bill of Exceptions, and while testifying in regard to the chemical analysis of the hops was interrupted by the objections to the witness' testimony along the line of chemical analysis of hops as incompetent, irrelevant and immaterial and an attempt to impose in this case a standard different than that of the hop men. The Court made the following ruling: There has been testimony here coming from the witnesses produced by the plaintiff touching the amount of resin or pollen, as it has been described, or the lupulin that is contained in these hops, some saying that it had more and some less, and that seems to be the prime quality of the hop. If this witness

is competent to testify concerning the quantum of lupulin in the hops, or the specimens that he examined, I think that would be proper to go to this jury. To which ruling an exception was duly saved.

The said ruling is assigned as error. The Court committed error in overruling the objection and in making the said ruling.

V.

The Court erred in permitting the witness, Bert Pilkington, to testify with reference to a sample of hops furnished him by J. M. Edmunson.

Q. Now, what percentage of resin did you find in these hops?

Objected to as incompetent, irrelevant and immaterial; to which ruling an exception was duly saved. The witness answered: Why, the sample Edmunson handed me had 18.15 per cent total resin, and of that total resin, there was 16.24 what is known as soft resin.

VI.

The witness, Bert Pilkington, testified that he had received from hop growers and dealers samples of hops marked with the grading, and the Court committed error in permitting said witness to answer the following question:

What quality of hops were they claimed or styled to be, and the previous objection was renewed, which was that the testimony is incompetent, irrelevant and immaterial, a matter of hearsay only. The witness was not competent to judge. The objection was

overruled, to which ruling an exception was duly allowed. Witness answered:

Why, some of them were graded fancy, some choice, some prime, some medium. I don't think we had a sample marked "poor" in the entire lot.

The Court then asked the witness if he knew what a choice hop is in the market, and he answered: I cannot go out in the market and pick out a choice hop by just going around and feeling of it, or looking at it.

VII.

After some colloquy between the Counsel and the Court, and questions by the Court, the Court sustained the objections to this witness testifying with reference to the quantity of resin in the samples of hops sent him by other parties, and was excused.

The Court afterwards had the witness recalled and permitted him to testify over the objection of the plaintiff as incompetent, irrelevant and immaterial, which objection was overruled by the Court and exception duly allowed.

That the Court committed error in reversing the ruling and permitting the said witness to testify. The witness testified as follows:

One sample of choice hops by Judge No. 1, 1911 crop, contained 19.42 per cent total resin; and the other sample of choice hops, by Judge No. 2, 1911, contained 19.46; and the other sample of choice hops, by Judge No. 3, 1911, contained 19.98 per cent total resin. Prime, 1911, by Judge No. 1, contained 17.23;

next prime, by Judge No. 1, 1911, contained 18.83 per cent; and the next prime, by Judge No. 3, crop 1911, contained 20.19 per cent; the next prime, 1911 crop, Judge No. 3, 19.42 per cent; No. 2 Judge, 1911 crop, prime, 19.04 per cent. Now prime 1910 crop, by Judge No. 1, 15.95 per cent total resin. Medium—we have only two mediums. They are both 1910 crop. One is 17.21 per cent, by Judge No. 1. Another one is 13.46 per cent, by Judge No. 1.

VIII.

That the Court erred in overruling the motion made by plaintiff to strike out all the testimony of the said witness, Bert Pilkington, as being incompetent, irrelevant and immaterial, and as assuming that a hop that contains eighteen per cent and a fraction, whatever it is, is a choice hop, or a hop that is a first quality under this contract, which motion was overruled by the Court, and the Court duly allowed an exception thereto.

The material testimony given by the witness, Bert Pilkington, with the objections thereto and the rulings thereon and exceptions are more fully shown by quotations from the Bill of Exceptions for the purpose of showing the materiality of the said objections, and said motion is as follows:

The witness testified that he was a graduate chemist, was employed in the chemical department of the Agricultural College of the State of Oregon, since 1905; that he had undertaken an investigation of the characteristics of hops.

Q. Please explain the character of the work?

A. Well, for instance, one of the particular features was a revision of the method of chemical examination of hops.

Q. What was the final object in obtaining this process of chemical analysis?

A. The thing that led up to that was the variation, or so-called variation, in the examination or the commercial judging of hops. And the attempt at that time—it was taken up as an Adams project, under the Adams fund, by the Federal Government, to see if they could arrive at some definite method for examining hops, whereby hops would be given examination according to their worth.

Q. Did you examine some samples of hops that he sent you in 1913?

A. Yes, sir, I did.

Q. About what time in the year was that?

A. That was somewhere between the 1st and the 10th of June, if I remember right. I don't remember the exact date.

Q. Now, did you make a chemical analysis of those hops to ascertain the amount of brewing quality in them?

A. Well, the chemical analysis shows the resin quantity.

MR. WILLIAMS:—We desire to make the objection to this witness' testimony along that line for the reason that it is incompetent, irrelevant and immaterial, and an attempt to impose in this case a stand-

and different from that of the hop men.

COURT:—There has been testimony here, coming from the witnesses produced by the plaintiff, touching the amount of resin, or pollen, as it has been described, or lupulin that is contained in these hops, some saying that it had more and some less; and that seems to be the prime quality of the hop. If this witness is competent to testify concerning the quantum of that lupulin in the hops, or the specimens that he examined, I think that would be proper to go to this jury. You may proceed.

MR. BEAN:—We save an exception.

Q. Now, Professor Pilkington, you said you made a chemical analysis of these hops?

A. That Mr. Edmunson furnished me?

Q. Yes.

A. I did.

Q. And according to the scientific method used for that purpose?

A. Yes, sir.

Q. Now, what percentage of resin did you find in these hops?

Objected to as incompetent, irrelevant and immaterial.

COURT:—I think I will hear that. The objection will be overruled.

MR. WILLIAMS:—We desire an exception, your Honor.

COURT:—Very well.

A. Why, the sample Mr. Edmunson handed me

had 18.15 per cent total resin, and of that total resin there was 16.24 what is known as soft resin.

COURT:—What?

A. Soft resin. You might say there were three resins in the hop.

Q. What was the third resin?

A. That is what they call a hard or worthless resin. That amounts to the difference between the total resin and the soft resin; three resins comprising the makeup of that part of the hop.

Q. Did you ever make any examination of this kind of hops that are pronounced by experts as choice hops?

Objected to as incompetent, irrelevant and immaterial.

COURT:—Do you know what a choice hop is, in your experience; that is, choice hop measured by the commercial rule?

A. No, sir, I do not.

COURT:—You do not?

A. No, sir.

MR. SLATER:—Your Honor, I want to show that the percentage of resin found in this particular sample of hops—its relation to the percentage found in the hops of different qualities that he examined.

COURT:—Well, unless he knows the percentage that exists in the commercial hop of the different qualities, it doesn't seem that he would be competent to testify. If you can show by this witness

that he is acquainted with commercial hops, and the amount of resin, for instance, in a prime hop, or a choice hop, or a medium hop, then his testimony would be competent on that point.

Q. Now, what different qualities of hops were these samples that you received; represented to you to be, by those who gave them to you?

MR. WILLIAMS:—Objected to as incompetent, irrelevant and immaterial; matter of hearsay only. The witness was not competent to judge.

Objection overruled. Exception allowed.

A. Do you mean by that the grading?

Q. Yes. What quality of hops were they claimed or styled to be?

MR. WILLIAMS:—I desire to renew our objection, your Honor.

Objection overruled. Exception allowed.

MR. SLATER:—That will be understood.

A. Why, some of them were graded fancy, some choice, some prime, some medium. I don't think we had a sample marked "poor" in the entire lot.

COURT:—Do you know what a choice hop is in the market?

A. I couldn't go out in the market and pick up a choice hop, just by going around and feeling of it, or looking at it.

COURT:—Do you know the amount of resin there should be in a choice hop as sold in the market?

A. That would depend on who judge the hop.

COURT:—That would depend on what?

A. That would depend on who graded the hop, whether it was a choice hop, or prime hop, or medium hop. That was what this work was for. I might say, in explanation, what this work was for was to compare these different gradings by different judges.

COURT:—Then there is no uniformity in grading?

A. Not according to these different judges; they don't agree.

MR. WILLIAMS:—That is the very vice, your Honor.

COURT:—That is the kernel of the cocoanut in this case, it seems to me, the very thing we are trying to get at now. Now, if you know what a choice hop is in the market, why then you can measure your chemical analysis of your resin in the hops you have examined with choice hops. Otherwise, I don't see that we can get a correct estimate in this case upon this particular question.

MR. SLATER:—Your Honor, I think his testimony may be relevant to show the percentage of resin in this particular hop as compared with other samples of hops known in the market as choice, medium and prime, the percentage that might be in them. It is true this witness might not be competent to testify that he can pick out a choice hop.

COURT:—He says he doesn't know, of his own knowledge, what a choice hop is; nor a prime, nor medium. He says that knowledge he has comes

from samples of hops that have been sent to him which have been represented to be so and so. Then he says the judges themselves don't agree upon what is a choice hop, and the amount of resin that should be contained in a choice hop. That is the trouble in making the comparison here.

MR. SLATER:—Well, your Honor, in order to make the record than, we desire to show by this witness that this witness made chemical analysis of a large number of different grades of hops, and that the averages run from 13.49 per cent; and that the minimum percentages for the year in which he made the examination in question was 15.54 per cent; the maximum was 20.49 per cent, and the average 18.06 per cent. That is the testimony that we offer to show by this witness.

COURT:—You don't know, of your own knowledge, about the samples, whether they were choice or prime or medium as to quality?

A. No. We didn't care for that on this other work we were undertaking. We asked—if I may make an explanation there?

COURT:—Yes.

A. We asked that these judges, or asked M. Livesley to send us in a sample of hops judged by different judges, and then we wanted to analyze those hops, and see how those judges agreed. Now, that was the object of that piece of work that we undertook at that time. Now, those hops were graded according to the terms on the hop market.

COURT:—You were inquiring only as to one quality, and that was the quality of the amount of lupulin?

A. No, I might say this—well, that was the standard by which we were measuring; that is, the resin—to see if the resin in a choice hop graded by Judge No. 1 would agree with Judge No. 2, or whether medium graded by one judge, a hop graded by one judge as a medium would have the minimum amount of resin equal to a choice hop graded by another judge; to see if a medium fell in a definite class—if their judgment compared as to the amount of resin it contained.

COURT:—I don't think that that elucidated anything in this case particularly. I will sustain the objection, and you may have your exception.

Excused.

COURT:—Is Mr. Pilkington here?

MR. SLATER:—He was out in the hall a moment ago.

COURT:—I think I will take his testimony in regard to the amount of resin in the samples. After thinking that matter over, I think it would be a better ruling to let that go to the jury.

MR. WILLIAMS:—We will take an exception, if your Honor please.

COURT:—You may have your exception.

BERT PILKINGTON:—Resumes the stand. Direct examination continued.

COURT:—I have concluded that you might an-

swer as to the amount of resin you found in these different samples. I think the manner in which you obtained the samples has been sufficiently explained heretofore. You may have your objection, and your exception to the Court's ruling.

The witness was then permitted to refer to memorandum written by him with reference to hops of different qualities.

COURT:—Well, now, who are the judges?

A. I don't know who the judges were. Mr. Livesley furnished these samples. The pamphlet there states how those samples were procured and the object of getting those. These samples were numbered, and the grade was put with that number in the letter sent to us, and the samples forwarded at the same time.

Q. Is Mr. Livesley a regular dealer in hops, in this state?

A. Yes.

Q. An extensive dealer?

A. He was at that time, yes.

Q. Do I understand you that Mr. Livesley furnished all these samples?

A. Those samples that are given there? No, Mr. Livesley did not furnish all the samples. Mr. Seavey furnished part of the samples. If I remember right, the larger number of the samples were received from Mr. Livesley.

COURT:—I think you may give the names of gradings according to the samples sent you, the

judging of those samples. Just give the general range. Take the prime, for instance. Take the choice, for instance, and then prime, and indicate it.

A. All right. One sample of choice hops by Judge No. 1, 1911 crop, contained 19.42 per cent total resin; and the other sample of choice hops, by Judge No. 2, 1911, contained 19.46; and the other sample of choice hops, by Judge No. 3, 1911, contained 19.98 per cent total resin. Prime, 1911, by Judge No. 1, contained 17.23; next prime, by Judge No. 1, 1911, contained 18.83 per cent; and the next prime, by Judge No. 3, crop 1911, contained 20.19 per cent; the next prime, 1911 crop, Judge No. 3, 19.42 per cent.

COURT:—What was that that contains 15 per cent?

A. I haven't come to that one yet. I will get at that in just a minute. No. 2 Judge, 1911 crop, prime 19.04 per cent. No. . . , prime, 1910 crop, by Judge No. 1, 15.95 per cent total resin.

COURT:—So the prime varies all the way from 15.95 to about 20 per cent.

A. To about 20½.

COURT:—Well, now, give the medium.

A. Medium—we have only two mediums. They are both 1910 crop. One is 17.21 per cent, by Judge No. 1. Another one is 13.46 per cent, by Judge No. 1.

At the close of witness' testimony, plaintiff made the following motion:

MR. WILLIAMS:—To save the question, we move to strike out all the testimony of this witness, as being incompetent, irrelevant and immaterial, and as assuming that a hop that contains eighteen per cent and a fraction, whatever this is, is a choice hop, or a hop that is of a first quality under this contract.

COURT:—The motion will be overruled. You may have your exception.

IX.

That the Court erred in denying the plaintiff's motion for a new trial and abused his discretion by refusing to grant a new trial, which motion was based upon the following grounds, to-wit:

First. That the verdict is against the evidence in this cause.

Second. That there is no evidence in this cause to sustain the verdict of the jury; that there is no evidence that there were 30,000 pounds or anywhere near that number of hops of the quality described in the contract produced by J. M. Edmunson during the year 1912.

That the only testimony in this cause given on behalf of the defendants that there were 30,000 pounds of hops raised by them of the quality described in the contract that could possibly tend to show that fact was the answer of J. M. Edmunson to the following question:

Q. Now, what do you say as to whether at the time that Mr. Hinkle inspected these hops on the 31st of October, that you had 30,000 pounds of hops

there of the quality described in that contract?

A. I considered that I had more than enough hops of the quality that would be sufficient, that would go on the contract. There was perhaps 50 bales or 60, between 50 and 60 bales, hops extra, besides enough. I had over 40,000 pounds, according to my recollection, in the whole crop.

That witness was testifying with reference to a conversation he had with Mr. Hinkle with reference to quantity said: I had more than the contract called for, and they had the privilege of selecting from the whole bunch, from all the bales, and he was asked this question:

Well, what was said, if anything, by you as to the quality of the hops?

A. I told him I thought I had hops good enough to fill the contract, a sufficient number of them.

This was all the testimony given by J. M. Edmunson along that line. He then testified in answer to this question:

What is your opinion as to what quality they were?

A. Well, I considered that I had over 20,000 pounds choice hops in the lot.

COURT:—Over how many?

A. Twenty thousand pounds. And the rest of the hops would grade prime, with the exception of what they called the ripe end. That was the seven or eight bales that they called over-ripe and the ends of the leaves were turned red.

Then in answer to this question:

Now you may state to the jury to what, if any, extent any of these hops were affected by mold?

A. Well, there was about 20,000 pounds of them that didn't have any mold, you might say. I call them free of mold. And the rest of them ran along gradually until the end of the season and they had some little mold in them; until the final end, the last day or two of picking, they had considerable mold in them and were over-ripe.

Then on cross examination, the witness was asked:

Q. How did you make your calculation that there were about 20,000 pounds that were choice hops?

A. Well, Mr. Woods picked out about 20,000 pounds that he claimed was the best of the hops. I never picked out the exact amount myself, because I was not grading them, but it ran fully that much or more; how much more they would run, I don't know.

Then witness was asked this question: And these 20,000 pounds were not affected by spraying or vermin damage?

A. No, sir.

Q. Now, how about the second lot, John?

A. Well, the second lot had a small amount of mold in them. That was all the difference. They were really a riper and better hop.

Q. There was some mold in the second carload?

A. Yes.

Q. Sufficient to make them take a lower grade?

A. No, I don't know. It is the way I graded them, anyway. They were a good prime hop, and a prime hop is not supposed to be perfect.

Wherefore, plaintiff in error prays that the judgment of said Court be reversed and that a new trial be directed in this cause.

JOHN M. WILLIAMS and
LOUIS E. BEAN,
Attorneys for Plaintiff in Error.

That orders were made from time to time granting plaintiff until August 1st, 1916, in which to file a bill of exceptions herein, and on the 29th day of July, 1916, a bill of exceptions was agreed upon, signed and filed herein as follows:

BILL OF EXCEPTIONS

(Title omitted.)

Be it remembered, that this cause came on for trial before the court and jury, a jury having been regularly impaneled to try the cause on the 24th day of February, 1916, whereupon the following proceedings were had from day to day until the 29th day of February, 1916, and taken in the course of the trial, the details and evidences stated below being incorporated in this bill of exceptions, being all of the evidence produced in said cause with reference to the quality and quantity of the hops in the

contract in litigation herein, for the purpose of passing upon the motion for new trial.

Max Wolf, being called as a witness in his own behalf, testified in substance: That during all the year 1915 he was a resident and citizen of San Francisco, California; that he took up his permanent residence in San Francisco in 1913; that in fact he lived nearly all his life in San Francisco, but was a resident of Portland, Oregon, during a part of the year 1912, and he took up his residence in Portland on account of the Klaber estate, and moved back to San Francisco about nine or ten months afterwards, in 1913 and reassumed his permanent residence in San Francisco, and has been a resident and citizen of San Francisco ever since.

The Court, in ruling on another question, said: "I suppose the other question would probably come up in this case as to whether Mr. Wolf has a standing in Court by reason of citizenship." Mr. Slater, of counsel for defendant, replied: "No, we don't intend to raise that question."

The witness testified that Netter died in September, 1913; that at the time of his death he and Mr. Netter were partners doing business under the firm name and style of Klaber, Wolf & Netter, in Portland, Oregon, and that the contract set out in the pleadings in this cause was made under the firm name of Klaber, Wolf & Netter, by the witness and Marcus J. Netter, as partners doing business under that firm name, Portland, Oregon.

(Testimony of H. A. Hinkle.)

H. A. Hinkle, being called as a witness on behalf of plaintiff, testified: That he has resided in Portland, Oregon, practically all his life; that he is with the Wolf Hop Company, and has been in the hop business about twenty-one years, and has been inspecting and grading hops for about eighteen years in Oregon and Washington, and was employed by Klaber, Wolf & Netter in 1912 and inspected the hops that were raised that year by J. M. Edmunson, the defendant; that he first saw the hops between the first and third of October of that year. Continuing, the witness testified:

“Between the first and third of October, by appointment, I met Mr. Edmunson at Goshen, for the purpose of inspecting those hops; and that morning we went over to examine them, and they were piled up in a warehouse and very little room to work. So I suggested that we line them up. Mr. Edmunson said that he was not able to work, and we could not get anyone to assist us to move the bales, and we got a few samples. I think we cut out two samples, and I requested of Mr. Edmunson if he knew where his best hops were that I would like to get samples of his very best ones. And we cut out, I think, two samples, and I told him at the time unless he had better hops than the samples that I had pulled at the time, that they were not the quality called for in the contract and would not go. But there was only one way to find out, and that was an inspection of each bale,

(Testimony of H. A. Hinkle.)

which was impossible for us to get at that day. That the color was dull, and some brown buds. One of them was slack, that is in quality, that would cause it to become brown. A hop, if you are not familiar with—it is bright; that is, a hop that is as it should be is bright in color and silky. You take a hop that is what you call brown buds, they are discolored and dull, and are of different grade than what a first quality hop would be. They were damaged by vermin, because they contained mold. Vermin is lice that comes on hops, and unless they are properly sprayed, as a rule, they cause the hop to become moldy. Of course, there is years when the weather conditions and things—the sun is warm—that the lice will leave them, and they are not as bad. But as a rule, hops that are not sprayed well become damaged by mold.

Q. To what extent was this vermin damage present in the samples that you obtained?

A. Well, they were immature. That was caused by vermin, where the vermin forms a honey-dew, in other words, and stops the growth of a hop, and they never mature up as they should if they were not affected by vermin.

Continuing, the witness testified in substance: that a slack hop is one not properly dried, not being left in the kiln long enough; a hop that has mold is not of sound quality and immature; that he told the defendant that it would be necessary to inspect all of the hops to find out whether there were any better

(Testimony of H. A. Hinkle.)

hops; that the defendant said he was in no hurry and that it would suit him better if the final inspection could be put off for a while, and that evening the conditions were reported to Portland, and witness was requested by the Portland office to go back the next morning and see if he could not possibly go through the crop; that he met Mr. Edmunson again by appointment in Goshen, and Mr. Edmunson said he was unable to get anybody to handle the hops; that they are pretty hard to handle and require some room.

That the next time he saw the hops was on the 30th or 31st of October, one of these two days; that Mr. Hayes and myself went out to Mr. Edmunson's farm, met Mr. Edmunson and told him he came for the purpose of inspecting the hops; on the 30th or 31st of October, I am not positive as to the date, and Mr. Edmunson said, "Well, you have already rejected them." Witness told him positively that they had not rejected the hops as a whole, and requested permission to inspect them, and finally after some talk he consented and went over and inspected the hops. "We inspected each bale, and I am not positive, but I am pretty sure that Mr. Edmunson requested that we put a grading mark as I would grade them on the hops, marking them one, two, three or four; and he himself, I think, put these marks on according to my grading. I think there were 104 bales that was marked with one, 80 bales that were marked

(Testimony of H. A. Hinkle.)

with a 2, 29 bales slack, and two bales that was perished. The 104 bales that were the brightest of his hops were about mediums. A medium is a third grade hop. The grades would be choice, prime and medium." He testified that he had read over the contract involved and that the first quality as described and defined in the contract would be a choice hop.

These 104 bales all contained vermin damage, they had more or less mold in all of them. What made them a third grade was that they were coarse and uneven color, containing mold, and stewed, and discolored buds, and there were several reasons for bringing them into the medium grade.

That he discussed this question of the damage in the hops with the defendant and told him that they were of inferior quality and not according to the contract; that he did not say very much, in fact I don't think he said anything. He did say that possibly they were better than what I thought they were.

That the next 80 bales were duller in color and contained more mold and were fully a half grade lower than the others at least.

That Mr. Edmunson did not claim that they were free from vermin damage, nor did he claim that they were even in color, and made no claims whatever that they were of any quality or that they were hops like called for in the contract; that witness told him we would submit it to arbitration or get somebody

(Testimony of H. A. Hinkle.)

else to inspect them if he did not like the grading, and Mr. Edmunson made no reply to this.

That the witness demanded the return of the advances, and that Mr. Edmunson said he could not do anything at present until after he could do something with the hops; that the next conversation that he had with him about the advances was in the following March, when witness demanded the money; that he went to Eugene, to see what he could do about getting the money, and met Mr. Edmunson, and demanded the money from him after he had sold the hops, and Mr. Edmunson told him that he did not intend to pay it back; that this was the first time that he had told him that.

On cross examination, witness testified: That on the 30th or 31st of October, 1912, admitted that it was on the 31st, when he was there he made a thorough inspection of the hops as follows: The customary way of inspecting hops, we use a tryer and stick it into the bale and we pull out a handful of each bale and then at intervals we draw square samples, about a pound. But this tryer we use pulls out enough hops that you can tell the color and flavor of the hops. This is the customary way of inspecting. That there were 104 bales of this lot of hops that was No. 1, that is, the best of his lot. Being asked what was the matter with the flavor of the hops, said they had a stewed flavor, as if they had been left either in the field and heating on the stacks, or put on the kiln, by the kiln

(Testimony of H. A. Hinkle.)

being overloaded and settling and continuing to fire causes the flavor to be poor. That these 104 bales might have been a little better than medium on a pinch; that the grade of hops above medium is primes, and above prime, choice. Being asked to describe a choice hop, said: A choice hop is bright and flakey, free from mold, good even color, fully matured, not damaged by vermin or anything like that, full of lupulin, and of good flavor. You have to have a good flavor to make a choice hop. The witness' attention was called to the fact that the contract said nothing about flavor.

Q. Then, in that event, you would say the flavor didn't have anything to do with the choice hop?

A. The flavor would have a lot to do with the choice hop.

Q. Well, but if this contract does not specify good flavor, how can you tell it calls for a choice hop?

A. Because it calls for first quality hop.

Q. This contract describes what a first quality hop is. And among the items of first quality is not good flavor.

A. It would have to be of good flavor to be a choice hop.

Q. Then you must admit that if this contract does not call for first flavor hops, or good flavor hops, it is not calling for a choice hop, is it?

A. Yes. It is calling for a choice hop anyhow.

Q. Now, I wish you would state to the jury what

(Testimony of H. A. Hinkle.)

is a prime hop.

A. A prime hop is a grade lower than the choice. It need not be so fat nor quite so bright, but it must be free from mold. It can be a little harsher, a little coarser in feeling.

Q. Well, then, a prime hop, in your opinion, need not have any mold in it?

A. No, sir.

Q. And must be bright in color?

A. Yes, sir.

Q. And it has got to be flaky?

A. Yes, sir.

Q. And you say not quite so fat. Now, what do you mean by that?

A. Not quite so much lupuline in it.

Q. What is the lupuline in a hop?

A. It is the pollen on the inside. It is the powder substance of a hop.

Q. Now, that is really the substance?

A. The main qualifications of a hop.

Q. Then, about the only distinction I can get from you as to the difference between a choice hop and a prime hop is a slight difference in the tone of color—not quite so fat?

A. No, it is not a matter of color. It is the same thing that could be with any other vegetation. Might take it in lines of potatoes and things like that. A choice potato, or a second grade potato—it is the same thing in hops.

(Testimony of H. A. Hinkle.)

Q. A prime hop, you would say, must have a good color?

A. Yes.

Q. Good, even color?

A. Yes, sir.

Q. And a choice hop, you would say, must have a good, even color?

A. Yes, sir.

Q. But you mean that a choice hop must have an extraordinarily fine color?

A. Yes, sir.

Q. And luster about it?

A. Silky.

Q. Silky color?

A. Yes, sir.

Q. Now you claim that some of these hops were not fully matured?

A. Yes, sir.

Q. What formed your judgment on that?

A. Because they are thin.

Q. Well, that is just another phrase.

A. All right, there is nothing inside of them, then. They are immature. There is no lupuline or resin in it, as you call it, in the hop.

Q. Now, if a chemical analysis of these same hops would show that the resin in that hop was more than a good average hop, would you say that it was fully matured or not matured?

A. Well, those hops were not fully matured.

(Testimony of H. A. Hinkle.)

Q. You would put your opinion on a mere examination up against a chemical analysis, would you?

A. I would on those hops, yes, sir.

Q. Now, you found some of those hops, you say, were slack dried?

A. Yes, sir.

Q. Now, what do you mean by that?

A. Why, they didn't dry them long enough. They put them in green, before they were entirely dry. And a hop that is slack will sour and perish.

Q. How long will it take it to sour, if it is slack dried?

A. That depends on climatic conditions a good deal, and how slack it might be. We found two bales that was perished in this lot.

Q. Now, doesn't it happen sometimes that when a hop in appearance might not have been dried quite enough, it would in fact dry out in the bale?

A. That depends on the kind of a place they would store it in.

Q. Well, now, as a matter of fact, don't you gentlemen that inspect hops disagree as to about how much drying is necessary to maintain a hop in the bale?

A. I don't think so necessarily.

Q. Well, don't you know that you do have difference of opinion as to whether a hop will keep or not?

A. Sometimes.

(Testimony of H. A. Hinkle.)

Q. So it is not a matter of certain judgment, but it is a mere matter of opinion?

A. Not necessarily; because a slack hop is something that you never can tell what it will do.

Q. Now, just describe how the cone of a hop should appear in the kiln to be sufficiently dried.

A. It should feel perfectly dry and the stem should be so you could break it.

Q. It should be so it is brittle?

A. Yes.

Q. Don't you know, as a matter of fact, that when the burr or stem of the burr is slightly tough, it is sufficiently dry?

A. Not always.

Q. Well, when would it be sufficient, if not always?

A. That would be under conditions of whether they was baling immediately or whether they expected to leave them in the store room a while.

Q. So it depends on a variety of circumstances as to whether the hop was sufficiently dry?

A. Yes.

Q. Now, you found only 29 bales of the hops that in your opinion was slack dried?

A. There were 29 bales slack. Two bales of it was perished, besides those twenty-nine.

Q. Very well. That left something like 170 bales that were not slack dried, didn't it?

A. Yes, sir; whatever it would—184.

(Testimony of H. A. Hinkle.)

Q. So then your real objection to these hops was the color?

A. The quality of them.

Q. Well, the color and the mold.

A. Yes, sir; and the flavor.

Q. Well, now, which was most important—the mold or the flavor?

A. Well, naturally moldy hops as a rule are of poor flavor. A hop that contains mold cannot be of the quality of a—not even a prime quality.

Q. Now, didn't you say to Mr. Edmunson at the time you were there examining these hops, that if these hops would come up to prime, that you would take them?

A. I think I did, yes.

Q. Now, you describe to the jury what constitutes mold in a hop.

A. It is a fungus that comes into hops from a vermin damage and causes the hop—if you leave them long enough they decay or rot on the vines. And of course when they dry them that shows. They become black on the inside, and that is a detriment for brewing purposes.

Q. If these hops were a fully matured hop and they had some mold in them, would that affect the quality of the hop for brewing purposes?

A. Yes, sir.

Q. Why?

A. Well, they claim that the mold causes some

(Testimony of H. A. Hinkle.)

trouble with your yeast, for brewing purposes.

Q. And you say they could not use them at all?

A. I am not saying that.

Q. Now, what causes that mold?

A. Vermin damage from vermin and lice.

Q. Well, the lice or the louse crawls inside of the burr, does it not?

A. I think so.

Q. And dies?

A. Yes, sir.

Q. Now, if it is in the outside of the burr and dies, does it cause any damage?

A. If it died on the outside of the burr?

Q. No; inside the first leaf or two.

A. I think so, yes.

Q. Even then it would cause damage?

A. Yes, sir, because it continues to decay.

Q. But if the burr is not decayed before it is dried, what effect would that have on it?

A. As a rule, they are not on the outside leaf. They are further in where they are moldy. That might be what you would call a trace of mold, where you just see a little speck on the outside leaf.

Q. Well, did you find a trace of mold in these hops?

A. Some of them was very moldy.

Q. Which ones were very moldy?

A. There was more mold in the 80 bales than in the 104. They all contained more or less mold.

(Testimony of H. A. Hinkle.)

RE-DIRECT EXAMINATION

Q. Mr. Hinkle, the quality described in the contract is as follows: "Of sound condition, good and even color, fully matured but not over-ripe, flaky, cleanly picked, properly dried and cured, free from sweepings and other foreign matter, and not affected by spraying or vermin damage." If the hop is free from those defects, what kind of flavor will it have?

A. Good flavor.

Q. Now, in testing hops, where there is a bad flavor or a vinegary flavor, what does that show in the hop?

A. Well, an immature hop will show a poor flavor, or the flavor can be damaged from smoke or from improperly drying—firing. And a hop that is over-dried also has a poor flavor. It shows a sweetish flavor.

Q. What is the purpose of an inspector in testing the flavor of a hop?

A. Well, it is to find out the grade of the hop to a certain extent—that is a great deal we go by.

Q. What does a poor flavor or a vinegary flavor in the hop show?

A. Poor flavor, that it is immature or something of that kind. It can be caused from different things; but as a rule the immature hops has got a poor flavor or sweated hops, stewed hops will have a poor flavor.

Q. The purpose of testing the flavor is simply to test whether or not these defects are present, as I

(Testimony of H. A. Hinkle.)

understand?

A. Yes, sir, that is the idea.

RE-CROSS EXAMINATION

Q. Now, that soured or vinegary flavor you are talking about usually appears in slack-dried hops, doesn't it?

A. A sour hop is of a slack type, yes.

Q. What was the flavor you said these hops had?

A. Some of them were sour; others were of immature flavor.

Q. Which particular ones were sour?

A. The slack-dried hops.

Q. That is the 29 bales?

A. And the two bales, yes, sir.

Q. And which now had the bad flavor from an immature hop?

A. Well, all of them were affected with the poor flavor.

Q. The 104 bales and the 80?

A. Yes, sir.

Q. But that was not the stewed effect?

A. They had a stewed effect, flavor, yes, sir.

Q. I thought you said that usually occurred in a slack-dried hop?

A. No, the sour flavor from a slack-dried hop.

Q. (Juror.) How do you test for the flavor?

A. With your nose. Use your nose.

Excused.

(Testimony of Hal V. Bolam.)

Hal V. Bolam, called as a witness on behalf of plaintiff, being first duly sworn, testified in substance as follows:

He resides at present in Portland, Oregon, and during 1912 he worked for T. A. Livesley & Company, Salem, Oregon. He has been a hop buyer and inspector for twenty years, and been in the hop business twenty-six years; was in the hop business first in London, England, and various parts of the continent of Europe from 1896 to 1908; 1908 came to the Pacific Coast, and have ever since resided in Salem and Portland, Oregon, and has bought hops and inspected hops in Oregon, Washington and California. He is now employed by the Wolf Hop Company, Portland, Oregon. That T. A. Livesley & Company received four samples of hops from the J. M. Edmunson yard at Goshen in 1912, and that he examined and inspected the samples, and found them dull in color. Three of the samples contained considerable mold, one not so much. The picking was fair to average picking. The hop was immature, lacking in good lupuline, flavor was poor, either from faulty curing, and partly probably from the immature nature of the hop. That a poor flavor results partly from an immature hop, a hop that is not ripened properly on the vine. A flavor can also be spoiled in the curing process. A hop is a very, very delicate fruit, and needs expert and delicate handling, otherwise it is easily spoiled. It must be picked at the

(Testimony of Hal V. Bolam.)

proper time and properly cured, otherwise the flavor will suffer.

Three of the four samples contained considerable black mold. The fourth not quite so much, but it contained mold, and would grade as a medium hop. The grades of hops being choice the best grade; prime the next standard; medium; then you come down to common or trashy grades. Trashy would mean a very poor quality hop. Mr. Edmunson sent us samples himself, in order that we could see what he had, and possibly buy those hops if we could use them. The samples were sent us in the month of February, 1913.

Being asked to state the purpose in testing the flavor of the hop, answered: "Well, I would explain it this way: You take out some hops from the sample and rub them up in your hands and get the flavor; flavor and appearance go very much together. If a hop looks good, it smells good; if it looks bad, generally the flavor is bad also. The brewers when they are buying hops demand a correct hop. If they are buying a choice quality hop, they want a hop that is rich in flavor. It must have that nice, fine, sweet, rich, pungent flavor. You pull a handful of hops out of the bale, and you immediately put it to your nose; that may be for two purposes, the first thing is to determine the curing of that particular bale of hops. You are not particularly testing it for choice flavor. You want to know whether that bale of hops

(Testimony of Hal V. Bolam.)

at that particular time is a sound bale of hops and will keep; whether that bale of hops at that time is sound, properly cured. You examine it then for color, freedom from mold, and so on.

The paragraph defining the quality of hops was read to him, and he was asked: "A hop minus all of these defects would have what kind of a flavor?"

A. Positively must have a good flavor. You test the flavor. If the flavor is bad, that hop must have some defect in some manner, shape or form, and it is up to you then to determine what that defect is. A hop minus all these defects would be a first quality or choice hop. A hop minus all these defects should be brilliant in color, velvety in texture, sweet and pungent in flavor, in other words be a choice hop. The hop samples sent in by Mr. Edmunson, and the ones I examined in Eugene, were as I have described them. Were dull in color, they had a stewed appearance, the flavor was poor and they contained mold.

On cross examination, Mr. Bolam testified he found mold in all the four samples of hops sent by Mr. Edmunson, but in one was less pronounced than the other. There was sufficient mold to take it away from any class except that of ordinary medium hop.

Q. Would a little mold take the hops out of the prime class?

A. Well, it would have to be very little indeed.

Asked to define a prime hop, he said: "A prime

(Testimony of Hal V. Bolam.)

hop, while not so rich and velvety in texture as a choice hop, should nevertheless contain a certain brightness and certain richness of cut and reasonably clean picking, and good flavor. It might contain a very small element of mold; but if there is much bad mold it is not a prime hop.

Witness was asked if he was not a witness in the previous trial of this cause and if he did not testify in answer to the question, what other defect, and answered a little mold in my sample, which I did not know myself; were sent to me by Mr. Edmunson. There was not a very great amount of mold. Now, is that correct?

A. Well, that would probably be correct, yes.

Q. But the hop was not a fully matured hop?

A. No, it was not fully matured. By appearance of the samples, the buds of the hops were not fully grown out. A hop may not be large, but it must contain lupuline. The lupuline is the pollen, which you find in the center of the hop cone. There is a powder or pollen in the center of the cone of the hop.

Q. Now, you look at that and judge or make your estimate as a matter of opinion as to the amount of lupuline that hop has?

A. Yes.

Q. And your judgment is now that these hops did not have sufficient lupuline to make them a mature hop?

(Testimony of Hal V. Bolam.)

A. Yes.

Q. Now, if those hops were analyzed by a chemist and found to have the usual amount of resin or lupuline in the best grade hop, would you still say it was an immature hop?

A. I would stand by my judgment, sir; yes, sir.

Q. In other words, you would put your opinion as a hop expert against the analysis of the chemist?

A. Yes; on the samples which I saw, certainly.

Q. Now, in a prime hop, as to the color, what kind of a color must a prime hop have?

A. Well, whether green or yellow, sir, is immaterial; but it must have certain brightness to it. Hops are very much like looking at fruit. You can tell if you look at a box of apples or a box of tomatoes.

Q. Well, you would say, then, a prime hop must have a good, even color?

A. Yes, certainly.

Q. Sure; but then that color might be extraordinarily brilliant and bright and make it a choice hop, might it not?

A. Yes.

Q. And it still might be richer and make it an extra fine choice hop?

A. Yes, sir.

Q. Now, isn't there such a grade as an extra choice hop?

A. Well, there is a very, very technical grade

(Testimony of Hal V. Bolam.)

they call a fancy hop, but it is not a trade term at all. We hardly ever use it any more.

Q. Well, there are instances of a hop being graded that way?

A. Well, you could say a first quality hop is a fancy hop. Nothing could be better than first quality.

Q. You call a first quality hop the very best, do you?

A. Certainly. You can't get anything better than first quality.

Q. But if in a description of first quality it says a good quality or a good color, do you have to have all that brilliancy about it?

A. Yes, you must have brilliant color to make a first quality hop.

Q. Yes, I know. But you said a prime hop was, all that was necessary was to have a good and even color.

A. Yes, a certain brightness with it.

Q. Sure, a certain brightness about it.

A. Yes. I didn't say either, Mr. Slater, that that is all that is necessary to make a prime hop.

Q. I am just talking about color now.

A. Yes, that is right now. That is right in color.

Q. But the distinction as to color between a choice hop and a prime hop is the degree of brightness, isn't it?

(Testimony of Hal V. Bolam.)

A. Yes.

Q. Now, doesn't a medium hop have to have that good and even color, too?

A. Yes, but it is a little less bright than a prime hop. It is a matter for the eye.

Q. So it is just a degree of brightness that distinguishes between these different grades?

A. Different colors.

Q. Yes?

A. Yes.

Q. So a medium hop could be a hop of good and even color, too?

A. Yes; but not as bright as a prime; nor is a prime as bright as a choice.

Q. Now, that is all the defects you found in these hops?

A. Yes, sir.

RE-DIRECT EXAMINATION

Q. What makes the difference between grades of color, Hal, in hops?

A. Well, a choice hop is a hop that has had the ideal amount of care in cultivating. It must have been thoroughly cultivated, properly sprayed at the right time, cleanly picked at harvest time, properly dried on the kilns, and properly baled afterwards.

Q. Now, that gives color?

A. Yes; that gives everything. Color and quality really go very largely together.

In October, 1912, choice hops were being pur-

(Testimony of Hal V. Bolam.)

chased from growers at from 19 to about 20½ to 21 cents. Prime hops were being purchased from growers from 17 to 18 cents; 16 to 18 cents would be a fair price; the medium hops were around 14 cents a pound. According to my recollection, these prices prevailed up to the 30th day of October.

Q. Don't you know, as a matter of fact, that as soon as the market opened it began to decline?

A. No, it didn't decline on choice hops.

According to the best of my recollection, the market began to decline along in November, when the demand slackened; up to then there was a very active demand through the latter part of September and the month of October for a good quality hop.

Harry L. Hart, being called as a witness on behalf of plaintiff, being duly sworn, testified in substance as follows:

That he has resided in Portland fifteen or sixteen years; is in the hop buying business and was in that business in 1912. Got samples of the hops grown on the J. M. Edmunson yards in 1912. Examined all that came to the office. There were three distinct sets of samples. The first was sent by Mr. Edmunson by mail or express shortly after harvest, another line of samples was drawn later, possibly in October or November, and a third line was taken out in March, when witness bought the hops, shipping samples.

Being asked to state to the jury what the defects

(Testimony of Harry L. Hart.)

of the hops were, testified: The color was not the very brightest, was not even in color; there was a certain amount of mottled color, what we call mottled or unevenness, and a trace of mold. They didn't grade the highest quality as a result of the fact that they were not perfect in color and the other requirements which go to make a top grade of hop. As near as I can recollect, we called them about a medium, some of them were not good medium, some of them were good medium. They were not all the same. The entire lot varied from an extreme low grade, we will say of poor medium, to an extreme high grade of good medium or thereabouts. When we shipped the hops we graded them into two distinct lots. We bought them at two distinct prices. We don't, in buying hops, just set down in our minds the grade. We go by matched samples as we sell them. It is so long ago that I do not know that I can tell you just the number of bales. I think perhaps half of them were poor mediums, and half of them were good mediums; in a general way, that may not be exact as to a bale.

The price is established absolutely by the quality. The percentage of difference between the best and the poorest or any intermediate grade might vary with the season, but in no case would a hop that was medium bring as much as a hop that was choice or prime.

Well, choice would be the best quality, and prime

(Testimony of Harry L. Hart.)

would be the next best, and there was a difference of say two cents, about two cents, in October, 1912, and between prime and medium were three cents. The buying at that time was confined very largely to the better grades, which made them worth perhaps a little more or the others worth a little less, or both, so that the difference was wider than might be the case under some other conditions. The latter end of October is the only part of the month that I have refreshed my memory on, referring to October, 1912. The latter end of the month choice hops brought 20 cents, and in some cases a little better. The market could be considered about 20 cent basis, average market.

Mr. Edmunson has made a practice of sending samples for some years. It is some distance down there, and to get the samples in to the trade. I think he used to send other people samples by mail, not wait for me to pull sample out, but pull them out and send them to me. The purpose of sending samples was to procure bids on hops, I presume, that is what it usually resulted in at least. The samples were sent as late as the middle or last part of October. That is more or less a guess, I don't remember that.

On cross examination by Mr. Slater, witness testified: That he bought the hops some time in March, 1913; that Mr. Wood, who is with him, inspected the hops, and the testimony of the witness was based on the samples which were brought in. Witness was

(Testimony of Harry L. Hart.)

asked: Now, as a matter of fact, Mr. Hart, when you were negotiating to buy these hops from Mr. Edmunson, didn't you tell him over the phone that these were prime hops?

A. I don't recall telling him that.

Q. Didn't you tell him that they would grade as prime hops, or something of that substance?

A. I am quite sure I did not.

Q. What defects did you say you found in these hops?

A. To the best of my recollection, it was unevenness and rather a dullish color and a little mold.

Q. What was the general character of the hop, green or yellow?

A. Greenish to greenish yellow, I think would cover it.

Q. You could not pronounce them an immature hop could you?

A. I don't remember them close enough to say they were either one or the other. I don't imagine they were particularly mature, on account of the fact they were rather greenish in color. But I not positive that they were immature hops. I am not positive that they were immature hops, from my memory.

Q. Well, could you say that they were a bad color?

A. They were a dull color.

Q. Well, but could you say they were a bad

(Testimony of Harry L. Hart.)

color?

A. Well, they were not a good color. They could not be a good color and be dull.

Q. They were not?

A. No.

Q. Could they be a reasonably good color?

A. They were a dullish color, Mr. Slater. It is a long time ago to remember the exact distinction.

Q. Well, now, when you say they were a dullish color, you are thinking of a bright, velvety color that you think of as a choice hop, aren't you?

A. That is the basis on which we establish our grading. We took the choice hops and grade from that down; not the poor ones and grade from that up.

Q. When you are grading hops as a choice hop, you must have a bright, uniform, velvety color?

A. Yes, to be a choice hop, it must have those features.

Q. And this contract that is sued on says, "A good and even color." Now, could you say that the color of these hops was a reasonably good color?

A. They were dullish; therefore, I could not say they were a good color. They were more or less mottled; so that I could not say they were an even color; they were not a good color compared to a choice hop, where they might have been considered a very fair color compared with a common hop, which is a still lower grade again. It is all by com-

(Testimony of Harry L. Hart.)

parison, you see. A prime hop must have a good color, too; perhaps not so good a color as a choice.

Q. A choice hop must have a veyr good color,

Q. A choice hop must have a very good color,

A. Hops are graded on other features besides color.

Q. I know; but I am just talking about color.

A. Well, I should say that a choice hop would be very bright in color.

Q. Yes; very good.

A. As bright as any that were raised that year.

Q. The best color that you can find a choice hop?

A. Yes, sir; well, the best of that year's crop at least.

Q. When we are talking about a prime hop, it must have what is called a good color, but not so bright or excellent as a choice hop?

A. Well, it might have just as bright a color as the choice, and have some other defect and then be graded prime.

Q. But suppose that was the only difference between the hops, was a question of color?

A. If that were the only difference, I should say a choice hop would be bright and silky and even in color, and a prime hop not quite so bright. That, I think, would cover it, if you are grading on color alone.

Q. But could you say that the color of this hop

(Testimony of Harry L. Hart.)

was not a good color, as language is ordinarily used?

A. I think I would say that, yes, sir.

Q. How much did you pay Mr. Edmunson for these hops?

A. Paid him 14 cents for 103 bales, and 10 cents for 103 bales, and there was a little—six or seven bales of very poor hops that we bought for eight cents.

Q. Well, now, what caused that extraordinary difference between the 14 cents quality and the 10 cents quality?

A. Well, it was a question of color and mold, chiefly, in those hops, as near as I can recall.

Q. Now, didn't you, in the first instance, agree to pay Mr. Edmunson 14 cents for all those hops excepting the few bales that were very bad?

A. No, I didn't. The deal was actually closed by Mr. Wood. I think the deal, as near as I can remember, was closed in Eugene by Mr. Wood. Mr. Edmunson and I talked on the telephone about it. My recollection is that Mr. Wood closed it.

Q. You testified that you didn't buy those hops as any particular grade?

A. No; we bought the hops on samples, Mr. Slater.

Q. What do you mean by that?

A. Well, on samples which had been drawn from the bales, and we agreed to pay 14 cents for all the hops which ran like the better end of the sam-

(Testimony of Harry L. Hart.)

ples, and 10 cents for all the hops which ran like the poorer end of the samples. There was quite a bunch of samples we had out of them. There was no way of detecting it unless we examined each bale by itself.

Q. When you sell hops, do you sell them on quality of choice, prime and medium?

A. Not in the bale; not at that time of year, very, very rarely.

Q. How did you sell them?

A. Sell them on samples.

Q. You sold these on samples.

A. Yes, but not the identical lot, I don't believe. Not the identical sample. We sell very frequently to match the samples.

Q. You had a sample from some buying house you were asked to match?

A. Yes.

Q. You sold these on that sample?

A. Yes.

Q. You shipped these hops to London, didn't you?

A. Yes.

Q. All these hops went on one sample?

A. No; no, they didn't.

Q. On your sale?

A. I don't think so. I didn't look that up, but I am quite convinced that they went on two distinct orders.

(Testimony of Harry L. Hart.)

Q. As a matter of fact, didn't you sell all these hops on one sample?

A. No, I think not, Mr. Slater.

Q. You don't know that you didn't?

A. I would not say that I did or didn't; but I am very much inclined to think I didn't, because the difference in the quality was too great for them to go on one sale at one price.

Q. They were export hops, weren't they?

A. They were exported.

Q. Well, now, isn't it generally known in the hop trade that export hops are of the best quality?

A. Not any more, no, sir.

Q. Not any more?

A. That expression used to be used years and years ago. And export quality at that time was considered the best, because England usually then only bought the best. But I think it is safe to say now that they take as many poor ones as they do good ones, and have for years.

Q. How long has that practice been in vogue of taking any quality?

A. Well, I have shipped hops to London for ten years, eleven years, and during all of that period we could sell poor ones at a price about as readily as good ones, if the price were tempting enough.

Witness was cross examined for the purpose of showing that he was friendly to the plaintiff, and admitted that he was; that his office was next to theirs

(Testimony of Harry L. Hart.)

at the time the contract was made; that he bought the hops, and Mr. Wood issued a draft for the same; that he stopped payment thereon at the instance of the plaintiff; that he knew they were financially interested in the hops; that if he paid the draft and they showed their interest he might have to pay it again, or part of it. That it was generally known that they had a contract for these hops, and that knowing that went ahead and made the purchase of the state. That he offered to ship the hops back to Mr. Edmunson for the purpose of protecting himself, but that the offer was not accepted. That pay- and got possession of the hops and shipped them out ment was stopped on the draft and the money was turned over to the Clerk of the Circuit Court at Eugene, Oregon, and with reference to the price of hops said that in October, 1912, hops of the grade of these hops would have been worth 16 or possibly 17 cents.

A. R. Zeller, being called as a witness, testified in behalf of plaintiff, after being duly sworn, in substance as follows:

I have been in the hop business for 19 years, and worked for Klaber, Wolf & Netter in 1912, and was running the office in Portland at the time the contract was made with Mr. Edmunson. Mr. Wolf came up in the fall of 1912 and was here with me.

Received six or seven samples of the Edmunson hops in the fall of 1912 and examined them. The

(Testimony of A. R. Zeller.)

hops were dull, brownish color, somewhat immature, and had mold in them to quite a considerable extent. I graded the hops at the time about a poor medium and a good medium on the samples received. The hops were not worth near the money that a choice hop would be worth. These particular hops there was mold in them; they were a dull color, the flavor was poor, the picking was fair, and were not worth as much money as the best hops. The first quality hops in October, 1912, ranged from 19 to 20½ cents; hops of the grade that these were ranged in October, 1912, around 15 to 16 cents, and the grade above would be 17 to 18 cents.

I have known Mr. Edmunson for ten or fifteen years; he was our agent at Eugene for some time; been pretty friendly with him all the time, he bought hops for us down there.

We had contracts for the resale of hops that we bought at contract that year. I instructed Mr. Hinkle to go down there and inspect the hops. If they was up to contract to take them in and pay for them.

CROSS EXAMINATION

Questions by Mr. Slater:

Q. Did you instruct him to be strict upon the judgment of the hops?

A. I always am that way.

Q. What?

A. I always am.

Q. Well, now, when the market price is much

(Testimony of A. R. Zeller.)

below the contract price, you instruct him to be very exact, don't you?

A. No more so than I would be if they were the same price. I want to know what the hops are when ever he goes down to inspect them.

Q. As a matter of fact, as it was in years like 1912, when the market price has gone down, is your firm not more exact in examining hops than you are when the market price is away above the contract price?

A. I don't think so; no, sir.

Q. It doesn't make any difference with your people?

A. No, sir, it does not.

Q. Now, what did you say was the defect in these hops?

A. Mold, dull color, immature.

Q. To what extent was the mold in the hops?

A. Some of the samples showed more than the others. There was quite a good deal of mold in some of them, and not so much in some of the other samples.

Q. Well, how many samples, or how many bales do you know had a good deal of mold in them?

A. To the best of my recollection, I saw 12 or 15 samples, somewhere along there. There was probably half of them that had considerable mold, and a half of them was some mold in.

Q. Very little mold?

(Testimony of A. R. Zeller.)

A. No, I said some.

Q. Some?

A. Yes.

Q. Well, now, wasn't it very little mold, if any?

A. No, some.

Q. Well, I know. Cannot you make a better estimate than some mold?

A. It is quite a lot over what a little mold would call for in our line of business.

Q. You say they were dull in color?

A. Yes, sir.

Q. What was the color of them?

A. Dullish. Samples I saw of them ran dullish brown; that is, brown buds mixed through them. Some was on the greenish; some greenish to yellow; but there was dull buds mixed all the way through.

Q. Well, now, did all the samples show that?

A. All that I saw, yes.

Q. Are those all the defects now that you found in the hops?

A. The flavor was poor.

Q. What kind of flavor did they have?

A. Stewed; with the exception of one sample. It was a little on the slackish order.

Q. What did you say the price of hops was on the 31st day of October, 1912?

A. What grade?

Q. Choice hops?

A. Nineteen to twenty and one-half cents.

(Testimony of A. R. Zeller.)

Q. What was the market price at that time of prime hops?

A. From 17 to 18.

Q. What was the market price of choice hops in 1913, March?

A. There was not any here.

Q. What was the price of prime hops the first of March, 1913?

A. Around 16 to 17 cents. They might have been down maybe to 15, 15½ to 17.

Q. What was the price of medium hops at that time?

A. About probably 12 and 14.

Q. Now, Mr. Zeller, when you examined these hops, you didn't find anything good about them at all, did you?

A. I don't think there was very much. I was not complaining much about the picking. That is the only thing that I didn't complain about.

Q. But they were no good at all, in your judgment?

A. They were good for something, yes. I am speaking now of good hops, though.

Q. Well, you wouldn't call them trash, would you?

A. No, sir.

Q. How does the mold effect a hop?

A. It lowers the quality of the hop if it has mold in it.

(Testimony of A. R. Zeller.)

Q. Well, now, a trace of mold, or a little mold in a hop sample, would not be noticed by some people, would it?

A. Yes, sir; I think it would be noticed by anybody.

COURT:—How do you discover the mold—under a glass?

A. You can see it with your eye. It has little black specks in it.

Q. Now, you say you take a sample of hop and there is a little mold in it. You say that will affect the hop. And then you take another sample, and there is some mold in it, but not enough to hurt it. Now, how do you judge those matters?

A. Well, you have simply got to size up the amount of mold that is in the hop. You can look at the hop itself and see how much mold is in it. You can take and size up how much is in it at the time.

Q. Have you ever known of an instance where one expert passes on hops and gives his judgment, and another expert gives a different judgment?

A. It might be, and show difference between their judgments.

Q. Did you ever know of a case where hops were rejected as prime hops, and they were afterwards sold as choice?

A. No, sir, I did not.

Q. You never knew of that? Did you ever know of a case where hops were contracted primes

(Testimony of A. R. Zeller.)

and rejected as mediums, but were sold as primes afterwards?

A. It might have gone in at a higher price, but I don't think the quality would ever have got up to a prime on them.

Q. Well, doesn't the state of the market affect the judgment of experts on those questions?

A. Not as far as quality goes.

Q. If the market happens to be advancing and booming, isn't it a fact, now, that the experts are more liberal in their judgment as to the quality of hops?

A. I don't think they are in the quality, no. They might be willing to take a little lower quality of hop at the same money, figuring that it is going up; but their judgment on the quality of the hop is just the same as it ever was. I don't think we ever vary on that.

RE-DIRECT EXAMINATION

Q. Counsel asked you if your instruction to the inspectors didn't vary from year to year. And you answered it didn't; that it didn't vary even when the price was up. Now, why doesn't it vary?

A. I want to know myself exactly what is in those hops. Consequently, I want the inspector to go through just as rigidly when the market is up or down, so that he will report to me what is in those hops.

(Testimony of A. R. Zeller.)

RE-CROSS EXAMINATION

Q. Now, isn't the main question that controls you and your men in making inspection the market price, as to whether the hops should be taken under the contract or not?

A. Do you mean if the market is down underneath the contract?

Q. No; supposing the market had been 10 cents higher than the contract price, as a matter of fact, wouldn't you have taken those hops in?

A. We certainly would, yes.

Q. Sure. Now, why?

A. We had to do it to protect ourselves on the loss that we had on the sale of those hops.

Q. There would not be any loss.

A. They certainly would be a loss to us if we had these hops sold.

Q. The fact is, in a circumstance of that kind, you can make money by taking the hops in, isn't it?

A. No, we would have lost money. We would have had to went out and bought other choice hops to fill the sale.

Q. That is in case you had contracted to sell these particular hops as choice hops?

A. Yes.

Q. Well, how did you know that you contracted to buy choice hops?

A. It is what the contract calls for.

Q. Does the contract say choice hops?

(Testimony of A. R. Zeller.)

A. First quality, which means choice.

Q. That is your judgment?

A. Yes, sir.

Q. But the contract does not describe particularly or expressly choice hops, does it?

A. It certainly does, yes, sir.

Q. It is only your judgment that it does?

A. Yes, sir.

G. H. Irvin, called on behalf of plaintiff, being duly sworn, testified in substance as follows:

Residence, Portland, Oregon, for about 11 years; in the hop business about 15 years; in that business in 1912, and working for H. L. Hart; worked for him in 1913; assisted in inspecting the hops purchased from Mr. Edmunson, and assisted Mr. Wood in inspecting all of them. Divided the hops, from the inspection, into the different grades. Of the best quality, there was in the neighborhood of 80 bales. We endeavored to divide them into two carload lots, making two cars approximately the same size. Finally picked out the better of the second grade, you might call them, enough to make 103 bales. The 80 bales of the best grade had defects, but we were not inspecting particularly against these defects. We were inspecting according to samples we had. There was mold in them, scattering mold throughout, possibly the entire crop, run through the 80 bales and through the entire crop. We found mold in all of those. There was none of them a particularly attrac-

(Testimony of G. H. Irvin.)

tive color. They were a greenish hop. Some would probably claim that they were immature burrs in them. The hop was probably picked a little bit early. The immature burrs run all through the crop. The bales were not even all the way through, we ascertained that by inspecting every bale, and comparing them, carrying them out where we had a good light, and looking for the difference as to color and as to flavor. Inspected some of the bales on both sides, some of them would be fairly good on one side, and on the other side would be some of the poor goods in it.

October, 1912, the best grade of hops were worth around 20 cents—19, 20 or 21 cents. Primes would go around 18 or 19 cents; mediums were around 16 and 16½ cents. We bought some at 15 cents.

In answer to the question: Who was it fixed the price of these hops with Mr. Edmunson, witness answered:

A. We wired for prices on them and secured an offer, and then we submitted that to Mr. Edmunson. And I don't think—I think we wired back a second time to try to get a raise, something to that effect. It was a mutual agreement between, virtually between Mr. Edmunson and the original buyer through our office.

Q. Do you know how many pounds were in the carload of 103 bales that contained the 80 bales of the better grade of those hops?

(Testimony of G. H. Irvin.)

A. I cannot tell you the exact weight, no; I don't remember that; I have got it.

Q. Approximately?

A. I suppose 19,000 pounds or a little more. Between 19,000—

Q. A little more than 19,000 pounds?

A. Yes, something more than 19,000 pounds.

Q. That was for the 103 bales that went into the car?

A. Yes. Well, both lots didn't vary much. There was not much difference between either of them. Of course, there were six bales on the side that didn't enter into this.

CROSS EXAMINATION

By Mr. Slater:

I didn't say we found the color off. I say we inspected according to the samples we had. The color was not attractive in any of them. Some of them were of poorer color or lesser color than the others. When we inspected the hops we expressed an opinion on the color to this extent, that some were not quite as bright as others, some of them showed discoloration from sweating. The hops were all shipped to one person. A distinction was made in the shipment as to quality. I do not remember as to whether they sold on one sample or not. They were only sold on one sample as far as selling was concerned. All went on one sample, practically so.

(Testimony of G. H. Irvin.)

RE-DIRECT EXAMINATION

Q. If they were sold on one sample, Mr. Irwin, how does it come there were two prices?

A. From the fact that some of them were not as good as this sample we sold on, in order for them to take them, why, there was a difference made in prices. That is generally the case and is often done. You cannot buy a lot of hops, that is, you are not sure of buying a lot of hops on one particular sample, have the crop running to that particular sample. If you take the crop you are supposed to get a concession on it according to their value. But I would not swear positively it is only one sample. That is my recollection. It may be two samples. I could look it up and find out.

RE-CROSS EXAMINATION

Q. Didn't you testify at the trial at Eugene they were sold on one sample?

A. I can't remember. I don't remember.

Q. I will ask you if this is not your testimony: "Do you know how they were shipped? Was there any distinction you made when you shipped the bunch? A. None at all so far as outward appearances were concerned." Is that correct?

A. That is correct.

Q. And this: "That is not the question I am asking you. When you shipped these hops, weren't they all shipped the same way?" "Yes." "As the same kind of hops?" "As the same kind of hops."

(Testimony of G. H. Irvin.)

“Is that correct?” “A. Yes.”

A. Yes.

EXAMINATION BY JUROR

Q. Do I understand this gentleman to testify that these hops were bought by Mr. Hart through an agreement with the grower and the contractor? I understand his testimony that way.

A. No. Shall I explain to him?

COURT:—Answer the question of the Juror.

A. As I attempted to answer here: They tried to ascertain how we arrived at the price. That was the way I endeavored to answer the question.

Q. Oh, one price?

A. One price. How did we get the offer for these hops? Well, we wired and asked them to make us an offer. You see, our people in London—they make us an offer; then we go and try to buy from Mr. Edmunson. If we are not successful in buying at that price, and we have to pay half a cent more, we will wire back, tell them we cannot buy at that price, we will have to pay half a cent more.

Q. You mean the contractor you sold to?

A. At the time I made the purchase—that is what I have reference to. I had nothing to do with the contract in dispute.

Q. My understanding of the testimony was, that you testified that you had a conversation with Wolf of that company, to ascertain the price.

A. No, no; not Mr. Wolf.

(Testimony of G. H. Irvin.)

Q. Well, then, it was your own contractor?

A. It was our own people in London that we were doing business with. That is the way we ascertain. As I understood, he wanted to know how we got this price. That is, how we arrived at the price.

Q. I misunderstood your testimony. It would make quite a difference.

Mr. Slater:—I would like to ask a question.

COURT:—Very well.

RE-CROSS EXAMINATION—Resumed.

Q. When you were negotiating with the ultimate buyer in London, did they have a sample of these hops on which your telegrams were based?

A. I don't remember whether it was this identical crop, or whether it was a crop of similar quality.

Q. You generally do that upon a sample of another crop, which is referred to by number, isn't it?

A. Yes, sir.

Q. And you try to match that sample?

A. We do, yes, sir.

Excused.

Adjourned until 10:00 A. M.

James Hayes, called as a witness on behalf of plaintiff, being duly sworn, testified in substance as follows:

I reside at Eugene, and have resided about twenty-five or thirty years in Lane County. Am a hop grower and buyer; in that business about fifteen

(Testimony of James Hayes.)

years, I guess. In that business in 1912, working for Klaber, Wolf & Netter, as a local buyer. Was with Mr. Hinkle, when he went to inspect the Edmunson hops; was with him when he went out the first time. The first time we went out there we went out to go through the hops, and they were piled up in the warehouse and the warehouse man was gone, nobody to help us line them up, so we cut out a few samples and examined them is about all we did that day. I heard Mr. Hinkle say to John, or ask him, if he had any better hops than those. First John said he didn't believe he did, and then afterwards he said he thought he did have. The samples were poor color and mold in them. In place of being a bright color, they were rather a copper color, dull color, sort of mottled. I am under the impression now that John selected the bales from which these samples were taken, because the idea was to find out, to get the best, if there was any there, or get a line on them, and I think John would tumble over a bale and look at it, and probably go to another, but I don't remember positively about that. The fact that the hops were uneven in color, and of a poor color and had mold in them was called to John's attention at the time. He didn't say much of anything about it.

Q. Did he dispute it?

A. I could not say that he did.

Q. Could you say that he didn't?

(Testimony of James Hayes.)

A. Yes, he didn't. He didn't dispute it, any more than after examining the samples he thought he had some better hops in the pile.

Q. He didn't dispute the fact that these two samples or what samples you had there, had mold in them?

A. No, sir, anybody could see the mold.

Q. Was there any controversy between you and Mr. Hinkle, and John on the other side, about the quality of the hops that were in those samples?

A. No, not a bit. There was no dispute over that.

Q. Now, what was said, if anything, about a further inspection of them?

A. Well, it was agreed there that we would come back later when they had more time. And John said he was in no hurry; any time would do with him.

Q. What was the reason, if there was one, that you didn't make a complete inspection at that time?

A. The hops were piled up and there was no room to get at them. It takes lots of room. You have to line every bale up so that you can get at them. That was the only reason why we didn't go through them. We were ready. The warehouse man was gone. John didn't seem to know where he was or whether he could get at him or not. He said he didn't feel like tumbling the bales around there.

Witness continued: Mr. Hinkle went back that evening or the next morning. Witness didn't go

(Testimony of James Hayes.)

with him, was too busy in Eugene; was with him when he went back to inspect the hops about the 30th or 31st of October. Went out there in the morning, forenoon, there was quite a little parley there before John went over with us to the warehouse. We put in about all that day. Inspected every bale of hops. All of them were moldy, all showed mold, every bale I remember we tried; noticed that very carefully. The color was poor, it was not up to what the contract called for.

Q. Explain what you mean by poor?

A. A dull, muddy color, not bright, not bright like a nice load of hay.

Q. Was the color even?

A. No, I think the yard had fallen down that year, and caused probably to be some dead berries, etc. The dead berries gave them probably a reddish brown, something like that.

Q. Did it give it that color?

A. Yes, it did. The quality of the hops was not discussed very much during the day. He didn't say very much about the quality. We just went through them and taken as a matter of course. He didn't dispute any of the grading at the time.

Q. What I want to get at is this, Jim, whether or not, as you would take the samples out, John was there and looked at them himself?

A. Yes.

Q. Was the fact that they were all moldy called

(Testimony of James Hayes.)

to John's attention at that time?

A. Yes, sir.

Q. What, if anything, did he say about it?

A. Well, he didn't dispute it any. He could not dispute it. The hops showed for themselves.

Q. What was said, if anything, between Mr. Hinkle and John on account of the advances?

A. Well, after he went through the hops he told him he demanded the money back.

Q. What did John say about it?

A. John said he would have to give him time, or wait till he sold his hops.

Q. Was anything said about arbitrating?

A. Yes; I think Mr. Hinkle said that he would like to arbitrate with him if he was not satisfied with his grading.

Q. State whether or not John said that he was satisfied or was not satisfied?

A. Well, John didn't either say he was satisfied or dissatisfied. He didn't say anything.

CROSS EXAMINATION

By Mr. Slater:

Q. Now, Mr. Hayes, when you were there the first time, on or about the 3rd of October, can you state just what the conversation was between Mr. Hinkle and Mr. Edmunson about these hops?

A. You mean about the quality or about going through them?

Q. Yes, all the conversation that was had there

(Testimony of James Hayes.)

at that time?

A. Well, Mr. Hinkle told him—he wanted to know if he had any better hops than those.

Q. Well, now, what did Mr. Edmunson say?

A. First he told him no. And afterwards he told him maybe he did have.

Q. Well, what did Mr. Hinkle say about the quality?

A. Well, he told him the quality was inferior; it was not up to the contract.

Q. Is that all he told him?

A. Well, I think that is the substance of it, yes.

Q. Didn't he say something about being willing to take these hops under that contract?

A. He said he could not take them unless they was better than that sample, than those two samples.

Q. Is that all he said?

A. I could not repeat word for word what he said; but that was the substance of it.

Q. You don't mean to say that Mr. Edmunson didn't say anything at all to Mr. Hinkle there?

A. He said first that he thought those were as good hops as he had. And afterwards he seemed to be kind of debating in his own mind and came to the conclusion that he thought he had better hops in the pile.

Q. Now, the fact is, you could have made an inspection at that time, if you and Mr. Hinkle had been willing to tumble those bales around, couldn't

(Testimony of James Hayes.)

you?

A. Well, I had an engagement myself that afternoon to take in a lot in Eugene. And I can't speak for Mr. Hinkle; he can speak for himself.

Q. The real fact is, you didn't want to spend the time there that day in handling those hops?

A. It is the warehouse man's business to tear a pile down and line it up for the buyer.

Q. Well, but the main reason, now, that you didn't inspect that day, was because you and Mr. Hinkle didn't want to handle those hops?

A. The reason we didn't inspect them was because they were not lined up.

Q. But they were there in the warehouse?

A. Yes, they was piled up and hay piled around them; that is, part of the warehouse was piled full of baled hay.

Q. You don't mean to say the hay was on the hops?

A. No, I don't mean to say that.

Q. Well, there was—

A. There was no room to line them up.

Q. No room?

A. No, sir.

Q. How much room do you need for the inspection of hops?

A. It takes a whole lot of room for 200 bales of hops.

Q. You want to have the bales all up in one row,

(Testimony of James Hayes.)

do you?

A. No, it is not necessary. You can line up 40 or 50 bales and pile them up again.

Q. You didn't like to do that kind of work?

A. That is not the buyer's job. That is the warehouse man's job, and he was not there.

Q. The reason, then, that you—

A. It is the grower's, the warehouse man's business to line up the hops, furnish scales, etc.

Q. The reason you didn't inspect that day was that you didn't want to do that work?

A. Well, it was late in the forenoon when we got there, and I had an appointment in the afternoon in Eugene to take in a lot of hops.

Q. Now, the last time you were there, on the 31st, who was there then?

A. Well, John and myself and Mr. Hinkle and the warehouse man.

Q. Did you have any more room there then than there was before?

A. I think there was.

Q. Wasn't it practically the same condition in the warehouse as it was when you were there on the third?

A. No, I think there was more room.

Q. Who did the work there then?

A. Well, the warehouse man and John, I think. lined them up, and we went through them.

Q. You didn't do any of the work?

(Testimony of James Hayes.)

A. No, sir. Oh, I helped.

Q. What?

A. I didn't do any boosting of any of the bales.

Q. You didn't do any of the longshoreman work?

A. No, but we were busy.

Q. Busy at what?

A. Trying the hops; carrying to the light, and sampling them.

Q. You could not do that until after this work had been done?

A. Not until after they was lined up.

Q. Now, did you hear all the conversation between Mr. Hinkle and Mr. Edmunson on the 31st of October, that occurred that day?

A. I could not say that I heard all of it.

Q. Well, were you with them all the time that they were there?

A. Oh, with the exception of probably a little while I was.

Q. Where were they when you were absent from them?

A. I think about the only time I was away I went to get the team, is the only time I remember I was away.

Q. How long were you away from them?

A. Oh, I don't know; probably 10 or 15 minutes, something like that.

Q. You don't know whether they had any con-

(Testimony of James Hayes.)

versation during that time or not, did you?

A. No, I could not tell what they was doing when I was not there.

Q. Do you know where they were at that particular time?

A. Well, I don't know whether they was in the warehouse or waiting for me on the road. I could not tell. The work was all finished.

Q. You say that you have been engaged in inspecting hops?

A. Yes, sir.

Q. That is part of your business?

A. Yes, sir.

Q. How long had you been so engaged before 1912?

A. Oh, 11 or 12 years, I guess.

Q. Were you working for Klaber, Netter & Wolf all that time?

A. No, sir.

Q. Now, you say these hops, according to the samples you examined, were poor in color. Now, what quality of hops were you comparing these with, to get your judgment of poor color?

A. Well, either primes or choice.

Q. How?

A. They were poor as compared with prime hops.

Q. What kind of a color would you require for a choice hop?

(Testimony of James Hayes.)

A. Well, a choice hop is a bright color; clear, bright color.

Q. Velvety color?

A. Yes, sir.

Q. Well, now, are there different grades of colors for choice hops?

A. Well, there might be a little—the main thing, the color has got to be bright and clear, whether it is a yellowish color or a greenish color; not dull, like it had been tramped in the ground.

Q. What is the difference in color between a choice hop and a medium hop?

A. Well, there would be about as much difference in color there as there would be between a five dollar gold piece and a penny, as near as I can tell you.

Q. What is the color of a prime hop?

A. It is a bright color.

Q. Is it a bright color, too?

A. Yes.

Q. About the same as a choice hop?

A. Not quite so bright.

Q. A little shade darker?

A. A little shade darker, yes.

Q. And what would be the color of a hop they call a medium hop?

A. Well, that would be duller, considerably duller than the prime.

Q. Just a shade duller than the prime hop, is

(Testimony of James Hayes.)

that it?

A. Yes.

Q. But still a medium hop would have to have a good color, wouldn't it?

A. Well, we don't consider a medium hop a very good color.

Q. Don't consider what?

A. We don't consider a medium hop as having a very good color.

Q. Then you don't agree with some other experts on that question?

A. If you call a dull color a good color, why, I don't.

Q. Well, now, how do you distinguish between a bright color and a dull color?

A. By my eyes, I guess, is all I know.

Q. Well, as to the characteristics?

A. Well, I just told you. A choice hop is like a real bright, glossy load of hay, while a medium would be more like a poor load; bad color; might have been out in the sun too long or damaged a little with rain, something like that. That is as near as I can get at it.

Q. In other words, a choice hop would have to have a glossy appearance like it had been varnished?

A. Yes, bright color; pretty.

Q. Now, while you were with Mr. Hinkle and Edmunson, in their presence, will you state what conversation they had about the quality of these

(Testimony of James Hayes.)

hops?

A. Well, I think I have already gone over that.

Q. I didn't hear it. You have given your conclusion, and not what was said.

A. Well, Mr. Hinkle told him they was a poor lot of hops; they didn't come up to the contract, and he couldn't take them.

Q. Is that all he said?

A. Oh, I don't know as that is all he said.

Q. I want all that he said.

A. I couldn't say all that he said—I could not repeat every word he said.

Q. Well, do you know anything else that he said?

A. Well, that is all I recall; the substance of the hops; they were poor; there was mold in them; some of them were slack; none of them up to first quality.

Q. Well, that is a question of what is first quality. Now, if you are not able to say what Mr. Hinkle said, can you tell me what Mr. Edmunson said?

A. I just told you what Mr. Hinkle said.

Q. I am asking you now what Mr. Edmunson said.

A. He didn't say much of anything. He didn't stand up and dispute the fact that they were first quality.

Q. That is a mere conclusion. I want to know what he said.

(Testimony of James Hayes.)

A. He didn't say much of anything.

Q. Can you say that he said anything at all?

A. Well, he didn't dispute the grading of the hops. I could say that much.

Q. But you can't say what he said, can you?

A. Further than the fact that he didn't disagree with Mr. Hinkle or hold up that his hops came up to the contract.

Q. But you can't say what he said?

A. I could not use the words, his words.

Q. Now, didn't Mr. Hinkle say to Mr. Edmunson, "I want these advances back?"

A. He demanded the money back after he got through, yes.

Q. What did Mr. Edmunson say in response to that?

A. He said he would have to give him time; wait until he sold the hops. He thought hops would get better, something of that sort.

Q. After he sold the hops. Did Mr. Hinkle say anything to him about selling the hops?

A. After John sold the hops?

Q. No; after Mr. Edmunson said that he could not pay back the advances until after he had sold the hops, did Mr. Hinkle say anything to Mr. Edmunson about him selling the hops?

A. Oh, I think he told him—no, I cannot say what Mr. Hinkle's reply was. I don't remember.

Q. The fact is, you don't remember what was

(Testimony of James Hayes.)

said there at that conversation, do you?

A. Well, I just told you what I remember of it, as much as I remember of it.

Q. But your memory is very poor about what was said there at that time?

A. I don't think it is.

Q. Well, if your memory was good, couldn't you tell me what Mr. Hinkle said?

A. I remember Mr. Hinkle asked for the advances back, and John told him that he could not pay him back till he sold the hops. I remember that he didn't go any further. That is, it seemed to be satisfactory with Mr. Hinkle to wait. He said he wouldn't crowd him, or something of that sort.

Q. Now, did you have any grade that you put on those hops at that time?

A. I don't understand what you mean by grade. I think they were sorted and each lot marked with a certain number.

Q. Well, how did you grade them at that time, as graded by hop inspectors, outside of this contract, I mean?

A. I didn't grade the hops. Mr. Hinkle graded them.

Q. Didn't you express any opinion about them?

A. Well, I had an opinion. I don't remember whether I expressed it or not.

Q. Well, what was your opinion at that time?

A. As to the quality of the hops?

(Testimony of James Hayes.)

Q. Yes.

A. My opinion was that they were poor hops.

Q. Did you ever express an opinion that they were mere trash?

A. I don't think I ever said they were trash.

Q. Didn't you testify at the trial of this case at Eugene, in the Circuit Court of the State of Oregon, there?

A. Yes, sir.

Q. Didn't you testify there that in your opinion they were mere trash, or to that effect?

A. My best recollection is that I testified that I had heard them called trash.

Q. How?

A. My best recollection is that I testified that I had heard them called trash. I think the lawyer tried to make me say they were trash, but I don't think I said it.

Q. Now, were you not asked this question at that time, testifying as a witness: "You find any good quality in the hops at all?" and didn't you answer: "No, sir, it was a poor lot of hops, very poor."

A. Yes, sir, that is right.

Q. "When they get very poor it is what they call trash?" and didn't you answer: "Yes, that is what the trade calls them."

A. I heard the trade call them trash. I never said they were trash.

Q. You didn't intend to be understood at that

(Testimony of James Hayes.)

time that you were grading these hops as trash?

A. No, sir, just what I had said. I had heard the lot called trash in a casual conversation—lot of trash, something of that sort. And I had—

Q. Now, what constitutes the material part of a hop for brewing purposes?

A. The lupuline, I suppose.

Q. Where do you find that?

A. That is in the inside of the hop.

Q. Is that the only name that it goes by?

A. I don't know anything about the chemical names of hops.

Q. You don't know anything about the chemical qualities of the lupuline, do you?

A. No, sir, I don't.

Q. Did you ever hear it called resin?

A. Yes, I think I have.

Q. Now, if the hop is a fully matured hop, you say it has plenty of lupuline, and that constitutes the beer-making quality of the hop?

A. I don't know anything about the beer-making quality.

Q. You don't?

A. All I know about it is the selling value of the hops.

Q. Selling value?

A. Yes.

Q. What constitutes the selling value?

A. Well, color and quality.

(Testimony of James Hayes.)

Q. They don't make beer out of the color, do they?

A. I don't know anything about making beer.

Q. You don't?

A. I don't think I was ever in a brewery.

Q. Well, in inspecting hops, why do you put so much stress on color?

A. Well, because we can sell them. They sell according to the color and appearance, etc.

Q. Is that the only quality you inspect for, is color—

A. Oh, the color, and get them clean picked, rich in lupuline. It shows by the cut.

Q. What do you mean by rich in lupuline?

A. It shows by the cut; right down the cut you can see whether there is lots of lupuline or whether it is thin. They want to be flaky, silky.

Q. I want to confine your examination to that lupuline. You say it has to be rich in lupuline. Now, as a matter of fact, isn't that the prime necessity in the hop?

A. Well, of course, if it didn't have any lupuline in, I suppose it would be worthless.

Q. It would not have any value at all, would it?

A. I suppose not.

Q. Although it had a good color, it would not have any value at all, would it?

A. I don't think it would be possible for a hop to have a good color, etc., unless it had lupuline in

(Testimony of James Hayes.)

it.

Q. Do you think the lupuline makes the color?

A. No, I don't.

Q. Well, then, if lupuline does not make the color, it would be possible for a hop that had no lupuline in it to have a good color, wouldn't it?

A. I don't think it would be possible for a hop to have no lupuline in it. It would not be a hop.

Q. It would not be a hop at all?

A. I don't think so.

Q. But if a hop is rich in lupuline or resin that constitutes the lupuline, then it would be a good hop, wouldn't it?

A. I don't exactly understand that question, what he means by a good hop.

Q. Well, you are supposed to be an expert on this line.

A. If you want to know whether it is a choice hop or a prime hop or a medium hop, I can tell you about the selling value of the hop.

Q. Well, this contract does not specify a choice hop.

A. Well, a first quality hop, for that matter.

Q. A hop of a certain quality. One of them is a mature hop. What constitutes a mature hop?

A. That is a ripe hop; not picked green; full size.

Q. A full sized burr?

A. Yes.

(Testimony of James Hayes.)

Q. Some burrs that are very large have no lupuline in them at all, don't they?

A. Never seen a hop that didn't have any lupuline in them.

Q. Don't you know, as a matter of fact, in your experience as a hop inspector, that hops grown on a moist piece of ground, down in a hollow, is a big burr, fluffy, and had no fat or lupuline in it?

A. That is not a fact at all. I know hops grown between two and three thousand pounds to an acre, grow strictly good, choice hops.

Q. Yes; but hops grown in that way are a compact, hard burr, showing that they are fully matured. Isn't that true?

A. I don't believe I just get the drift of your question.

Q. (Question read.)

A. Well, his other question was that he asked me if hops grown on rich land, asked me whether they had much lupuline in them or not.

Q. No; that is not the question at all. I asked you if you didn't know hops growing in a low, moist place, where there is an excess of moisture, are large, fluffy burrs, like a bunch of feathers, and have no lupuline in them or prime quality at all?

A. No; sometimes they grow in the lowest, richest place, and they are very good hops.

Q. I didn't say rich. I said in a moist, damp place.

(Testimony of James Hayes.)

A. Well, my answer would be the same.

Q. Would be just the same. You give that as your expert opinion?

A. Well, I think the tendency would be they would not be so rich, quite so rich, where the moisture was excessive or the growth was excessive, as they would be on higher soil where you didn't raise so many to the acre, although I have seen choice hops grown on what you might call the richest land and get close to 3,000 pounds to the acre; and that is about as much as hops ever make.

Q. I am not questioning that; but don't you know, as a matter of fact, that in yards that grow as much as 3,000 pounds to the acre, grow in low places where there is an excess of moisture, the foliage is excessively large and green and the hop burrs are large and fluffy and of no value at all?

A. Oh, I think there would be value to it.

Q. Well, any material value?

A. I never seen hops so lacking in lupuline that there would not be any value to them.

Q. I will ask you this question: As a matter of fact, don't you know that on an upland, in a dry season, the hop burrs or cones are small and very dense, and yet are good hops?

A. Yes, they might be good hops.

Q. So that the quality of the hop does not depend merely upon the size of the burr, does it?

A. No, sir.

(Testimony of James Hayes.)

Q. But it depends upon the solidity of the burr and as to whether there has been an excess of moisture or not.

A. It depends on whether it is mature.

Q. Sure. Now, a mature hop is one that has the lupuline fully developed in the center of the cone?

A. Yes, a good, ripe hop.

Q. A good, ripe hop. Now, if a chemical analysis was made of these same hops and shows that the resin or the beer-making quality of the hop is equal to the average best hop, would you still maintain that these hops were not a mature hop?

A. I don't know anything about chemical analysis. We can't sell them that way.

Q. Now, as to the degree of maturity of a hop—how much less maturity of the hop as to lupuline does it require to make a prime hop as distinguished from a choice hop?

A. Well, a hop would not be choice unless it would be fully matured. If it is picked green it would show in the color.

Q. Well, now, would a prime hop have to be fully matured?

A. Yes, it would.

Q. Well, what difference, then, or distinction is there between prime hop and a choice hop?

A. Well, I think I have answered that question several times. A prime hop don't need to be quite

(Testimony of James Hayes.)

so bright; the quality not quite so good as a choice hop. It take a pretty good hop to be a prime hop.

Q. A pretty good hop?

A. Yes, sir.

Q. Just a little difference in the painting that nature puts on the face of the hop—is that all?

A. Well, I would not say it is quite as good a hop as the choice hop.

Q. But you don't know just what quality makes that distinction?

A. It is pretty hard to describe that. If I had a sample, I could show the jury better than I could describe it.

Q. In fact, there is no certain rule to go by to distinguish a prime hop from a choice hop, is there?

A. Well, it takes quite a bit of experience to acquire that, and one has to be able to do that to buy them successfully.

Q. Well, it rests on the personal judgment of each man, doesn't it?

A. Well, the trade is quite unanimous in deciding what is a prime hop and what is a choice. There is practically no difference depending on the grades.

Q. Practically no difference. But there is some difference in opinion, isn't there?

A. Well, no material difference.

Q. Well, what difference is there, if any?

A. No difference.

Q. No difference at all?

(Testimony of James Hayes.)

A. Practically no distinction.

Q. The expert opinion, then, is uniform on distinguishing a prime hop from a choice hop?

A. Yes, sir.

Q. And the only distinction I am able to get out of you is a slight difference in the brightness of the color?

A. Well, I don't think I answered that question just that way. A prime hop don't need to be quite so good in any respect as a choice hop.

Q. Well, that is what I want to find out. I want to find out whether there is any difference as to the maturity of the hop. You said no.

A. Well, a prime hop would need to be mature.

Ross H. Wood, called as a witness on behalf of plaintiff, being duly sworn, testified in substance as follows:

I reside in Portland, Oregon; am in the hop buying and shipping business; have been for 121½ years; was buying and shipping hops in 1912 and 1913 for Harry L. Hart, of Portland, and was working for him at the time he bought the Edmunson hops. I bought the hops and received them. Arrived at the valuation of the hops on the samples that we had of the crop out of the different bales. I inspected all or practically all of them. Inspected them with a tryer in each individual bale. John Edmunson, Lawrence Edmunson and the warehouse man and myself lined them up. When in the warehouse, it is a

(Testimony of Ross H. Wood.)

rule that the warehouse man lines them up. They charge for handling them; lining them up. The hops were purchased on samples that I cut myself. When we first sampled the crop to buy them I took probably six or seven samples. There were practically three grades of the hops, as near as I can tell. There was right close to 80 bales in the best grade. Of the 80 bales, 78, 80, 81 or 82 bales. They made two carloads. We put in 103 bales in the carload with the 80 bales. We paid 14 cents for this carload. We bought the crop at different prices. We were loading them into two cars instead of making an 80 bale car and putting the balance in a larger car; we just split the lot and made two carloads, 103 in each car. We paid 10 cents for the second carload. At that time prime hops were worth around $15\frac{1}{2}$, 16, $16\frac{1}{2}$ cents I believe. First quality hops were worth, I imagine, around $16\frac{1}{2}$ and 17 cents, carload lot.

Q. Did you notice any defects in the hops of the Edmunson crop as you inspected them?

A. Well, we bought them—the price speaks for itself. We bought them at different prices, of course, but our best price was not a price for first quality—14 cents.

Q. What defects were in them?

A. They were not any too well matured, and there was mold more or less all through them, some of them, of course, worse than others; and some of them was not very well dried.

(Testimony of Ross H. Wood.)

Q. Could you say that they were properly dried?

A. No, I could not. There was some of them that was, yes; some of them were dried all right.

Q. You may state whether or not they were of even color.

A. No, they were not.

Q. Just describe to the jury how they were of uneven color.

A. Well, that is pretty hard to do. There were some of the hops that were really over-ripe and some of them were green, mixed in all the samples, of the trying of each bale. Some of them showed more mold than others. The moldier ones would be the riper hops. That is about all you could tell in regard to hops without having a sample.

CROSS EXAMINATION

By Mr. Slater:

Q. Mr. Wood, you say that there were only 80 bales of this lot of hops that you could grade as of a better quality than the others?

A. There were some 80 bales that were of a better quality than the balance of the hops, yes.

Q. That is all you could find, now, that you could put into that grade?

A. Well, we didn't exactly grade the hops, only for a better hundred of them, and then a couple more of the best left to fill out the car.

Q. Do you mean to say that there was any ma-

(Testimony of Ross H. Wood.)

terial difference between those 80 bales and the next 130 bales?

A. Yes.

Q. What was the material difference?

A. Well, they were a little evenner in color and not so much mold in them.

Q. Now, you give that opinion now as an expert, do you?

A. Well, that is what the hops were, yes.

Q. Well, do you experts ever disagree about these things?

A. Oh, sometimes, in regard to picking, maybe one fellow would call hops a little poorer picked than others, in color yes, they can't exactly jibe.

Q. But you don't think you would disagree about the extent of mold in a hop, in a sample, and the injury it would make?

A. I hardly think so.

Q. You don't think different experts, now would disagree materially about how many bales of hops were of the best quality in this particular lot?

A. Well, that would be pretty hard to tell, in that lot of hops, because some of them in inspecting twice on the same bale would show a little difference in each side. They were mixed, sort of, don't you know.

Q. I see. Well, now, if some other expert that examined these hops, and said he had examined ev-

(Testimony of Ross H. Wood.)

ery bale, set aside 104 bales as containing first quality, you would not disagree with him, would you?

A. I certainly would.

Q. Now, if this evidence shows, that has been admitted here, that there were 104 bales of those hops that were marked as No. 1, in the inspection on the 31st day of October, 1912, would you say that you were correct, or that that expert was correct?

A. Well, he probably stabbed the bales in different lots. You know how hops are inspected, do you?

Q. Sure, I do.

A. Well, as I said, the lot was mixed. He might have got the good side of a few bales that I got the poor side of them, and different fillings in the baler.

Q. You know how hops are put in a kiln when they are dried, too, don't you?

A. Yes.

Q. They all go into the same kiln and are mixed?

A. Yes.

Q. So that when the baling is done at the kiln, they are generally of a uniform character?

A. Not always.

Q. What makes that difference?

A. One kiln can be dropped off the dry floor into the store room in one bunch, and another kiln next to it. And when they are filling the baler they might—they use big scoops—get a scoopful of one kiln and a scoopful of another. That would make a difference in the bale of hops.

(Testimony of Ross H. Wood.)

Q. Isn't it a fact that most of that difference occurs at the time of picking them; along at the last of the picking, the hops become a little riper and a little more of a yellow color; and of course being dried last they go in on top of the dry kiln? Now, isn't it possible?

A. It could be that way.

Q. Isn't it possible those hops might come out by themselves?

A. They might, yes.

Q. But that would not make a difference in the whole lot of hops, would it?

A. No; it would make a difference in some of the bales, though, at that.

Q. So you are not quite sure about the correctness of your opinion if some other witness here has testified there were 104 bales in this lot of hops that were marked as No. 1?

A. I would be if he used the same try holes that I did. Yes, sure, I would.

Q. Then it all depends upon the personal judgment of each man that examines them?

A. No, it does not. It depends on how the hops are baled.

Q. Now, you say some of those hops were **not** properly dried?

A. There were some 30 odd bales of them, I believe.

Q. You limit it now to 30 bales?

(Testimony of Ross H. Wood.)

A. I think there was.

Q. Not more than that?

A. There was more hops than that was not properly dried, that is, perfectly dry. But there were 30 bales that were worse than the rest.

Q. What was the trouble with those 30 bales?

A. They were slack dried.

Q. You took them in at what date?

A. At the same time.

Q. What was that date?

A. I can't tell you the exact date of that surely.

Q. It was along in March, 1913, wasn't it?

A. I can't tell you the date, I am sure. I could have looked it up, but I did not.

Q. Well, that was when they were sold?

A. Yes.

Q. Very well. Now, that was some six or seven months after they had been baled. And had any in-omnths after they had been baled. And had any injury come to those hops on account of being slack dried, as you say?

A. Poor flavor, yes.

Q. Poor flavor?

A. Yes, sir.

Q. Did you find that poor flavor just in those 30 bales?

A. No, sir.

Q. Where did you find the other poor flavor?

A. It was all through the lot. I can't tell you

(Testimony of Ross H. Wood.)

how many bales, but as I did tell you before, the 80 bales were the best flavor, best hops. The others were some of them a better flavor than others; some of them were poorer picked, worse than others, and some of them moldier than others.

Q. You say you bought these on sample; but what grade would you put them in according to the commercial custom?

A. I believe the 80 bales, better end of them was what we would call a medium to prime hop, good mediums at least.

Q. But you put 103 bales in that class, did you; and then you put 103 bales in another class?

A. Put them in another car, yes.

Q. Now, do you know how they were shipped?

A. They were shipped as a lot.

Q. As one lot?

A. Yes.

Q. To one person?

A. Yes; but on different samples, one sample. We represented the shipment as arriving 80 bales like one lot and the balance like the other samples.

Q. Do you know how they were sold as to sample?

A. How is that?

Q. Do you know how they were sold as to sample?

A. No, I don't.

Q. Did you make the sale?

(Testimony of Ross H. Wood.)

A. No, I did not.

Q. You didn't?

A. No.

Q. Now, you testified as a witness at the trial of this case at Eugene, didn't you?

A. Yes, sir.

Q. Didn't you testify there that these hops, the whole lot, were shipped as one shipment and went as medium to prime?

A. I don't know as I said whether they went as medium to prime. They did go as a lot.

Q. As a lot; that is what I mean.

A. Yes.

Q. But they went as medium to prime?

A. Well, I am sure that I didn't say they went as medium to prime, did I? Is that on there?

Q. Yes. You were asked this question: "What grade were the hops?" And didn't you answer: "Medium to prime is what we bought them for, and shipped them with the same grading."

A. We didn't ship the poorer end of those 30 odd bales.

Q. Didn't you testify to that as I have read to you at the trial of this case in Eugene?

A. I don't believe I hardly did that, no. We shipped them as a lot at two carloads. I know that. But as to shipping the poor end of those hops as medium to prime hops, it wasn't done.

Q. Do you know what particular quality of

(Testimony of Ross H. Wood.)

hops is required by this contract?

A. I have heard it talked about, yes.

Q. Did you ever see the contract?

A. No, I have not.

Q. Who undertook to relate to you the quality described in this contract?

A. I have heard it discussed by different people. I believe I discussed it with Mr. Edmunson there himself one time.

Q. So you understood at the time you bought these hops and inspected them as to what the requirements of this particular contract were?

A. No, I don't believe I did. It is since then Mr. Edmunson and I were talking about the lot and about the contract.

Q. Now, isn't it a fact that at the time you were taking these hops in, there was a conversation between you and Mr. Wood about what this contract required?

A. Myself and Mr. whom?

Q. Mr. Edmunson, I should say?

A. Edmunson. Well, I don't hardly remember whether there was or not. But it is understood—now, I don't know—I never saw this contract—but it is understood that hops delivered under a contract takes specified quality as primes or better; primes or choice, one or the other. I don't know what his contract calls for.

Q. Well, didn't you say to the defendant here,

(Testimony of Ross H. Wood.)

Mr. Edmunson, and his brother, in a conversation just after you had accepted and received these hops, that there were 20,000 pounds of these hops that ought to have been received on this contract?

A. I will tell you what I did say.

Q. Well, what was it?

A. That the 80 bales—it seemed like that Mr. Edmunson and Mr. Hinkle could have gotten together on the 80 bales. I didn't say according to the contract. I do remember that.

Q. You didn't say then—

A. That they should take them under the contract. I didn't, because I never read their contract; haven't seen it till this day. But I did say it seemed like the 80 bales better quality they could have gotten together on. Now, you ask Mr. Edmunson the question—

Q. That is all you said about that matter at that time?

A. I believe so, yes.

Q. Now, you testified, Mr. Wood, that some of these hops were over-ripe. Now, how did that affect the maturity of the hop?

A. Well, that was surely a mature hop. If it was not moldy, it was all right.

Q. How did it affect the quality of the hop, then?

A. You want the quality of the sample, or do you want just what the over-ripe hop is?

(Testimony of Ross H. Wood.)

Q. No, I want your judgment about the quality of this sample.

A. Well, there was some of them over-ripe and some of them not ripe enough—probably different parts of the yard.

Q. From what particular characteristics of the sample did you come to that judgment?

A. How is that? Well, because some of the hops were over-ripe by being red, and some of them were green. Just mixed in the sample.

Q. Well, don't you know, as a matter of fact, that in picking a reasonably large yard that the last of the picking usually is a little riper than the first?

A. Yes.

Q. They cannot all be of the same degree of color, can they?

A. Well, they can be practically so, yes; but not exactly the same. The first day's picking and the last day's picking—will be a difference in color; that is very true.

Q. What you men mean to get at is the general average of the crop?

Objected to as incompetent, irrelevant and immaterial.

COURT:—I think that is a pertinent question. I will overrule the objection.

MR. WILLIAMS:—Note an exception.

Q. (Question read.)

A. Well, yes. There was some of them green

(Testimony of Ross H. Wood.)

in each sample, and some of them were ripe—mixed—as you were talking a while ago about where those were dumped off the kiln floor.

Q. Well, you would expect to find in most any crop a few burrs that would be a little riper than others?

A. Yes; but not moldy.

Q. I am not talking about the mold. I am talking about the ripeness of them now.

A. Yes, but not over-ripe. These hops were over-ripe, were red.

Q. About the green hops. Do you say they were an immature hop?

A. Some of them were, yes.

Q. How do you arrive at that judgment—just because they were green?

A. Because they were of green color and thin. There was not very much lupuline in them—in other words, much pollen.

Q. Now, that pollen is in the center of the hop burr, isn't it?

A. Yes, sir.

Q. Now, that is the real beer-making quality of the hop, isn't it.

A. It is one of them, evidently.

Q. Now, couldn't a choice hop be greenish in color?

A. Not very well. It could be fully mature—

Q. Choice hops could not be of that quality un-

(Testimony of Ross H. Wood.)

less it was a fully matured hop?

A. It would have to be fully matured to be choice, yes.

Q. Your opinion is that a greenish hop could not be fully matured?

A. Yes, it can be fairly mature, but not ripe.

Q. Not ripe. So that, judging from the color, you would say that a choice hop could not be of a greenish color?

A. No, it could not be green, no.

Q. Well, then, in that respect your judgment differs from other experts that have testified here at this trial, doesn't it?

A. Probably it does, if they say so.

Q. Now, how do you judge as to the deficiency of lupuline in a hop?

A. By opening the burrs, as a rule; looking at the edge of a sample after pulling out a square-cut sample.

Q. From the color of it?

A. Well, a whole lot on the color. You can tell whether a hop is fat or not by looking at a sample pretty well from the color.

Q. Well, now, if it should appear that these hops that you say are of an immature character, upon a chemical analysis should have a quantity of resin or lupuline in the pollen up to the good average of a choice hop, then would you still say that your method of examination is accurate as against that

(Testimony of Ross H. Wood.)

method of testing?

A. Why, we buy and sell hops according to the quality that the brewers buy them at, is looking at the sample. And some brewers, of course, will take a greener hop than others. Some of them want ripper hops. But I believe if a hop is green and poor flavor that it cannot be anything but immature.

Q. You judge, then, because the hop, smelling, of it?

A. Yes.

Q. Has a poor flavor?

A. Yes.

Q. That it would be an immature hop?

A. Yes.

Q. Now, if you contract merely to buy a mature hop, without respect to color or anything else, would you undertake to say you can determine the maturity of that hop, the extent of it, with greater certainty than by a chemical analysis?

A. Not greater, I don't suppose, no. But that is not buying and selling hops. The way we handle our goods isn't that way.

Q. I am not talking about that.

A. I don't know anything about the chemical analysis of hops, I am sure.

RE-DIRECT EXAMINATION

Q. At the time you loaded the hops, put them in the car, and were settling with Mr. Edmunson for them, was there anything said between you and Mr.

(Testimony of Ross H. Wood.)

Edmunson in regard to the claim of Klaber, Wolf & Netter against Edmunson over advances?

A. I understood there was money due Klaber, Wolf & Netter. Mr. Edmunson told me at the time he was going to pay them.

Examination by Juror:

Q. Did you pay 14 cents a pound for 80 bales or 103?

A. I believe it was 103. I could not tell you.

Q. I mean for the whole carload.

A. I could not tell you right off-hand whether we paid 14 cents for more than 80 bales or not. I know there was three prices. There was one small lot—it was 8, 10 and 14. But I don't know just how many bales there were.

RE-CROSS EXAMINATION

Q. You say that you understood from your conversation that Mr. Edmunson was going to pay Klaber, Wolf & Netter?

A. He told methat he was going to, yes.

Q. Can you give his exact words?

A. No, I don't believe I can. I asked him about settling with Klaber, Wolf & Netter before the hops were shipped, because we didn't want to pay the wrong man—something to that effect. And he said that he was going to settle with Klaber, Wolf & Netter; and—now, I don't know just exactly the words; but that was the conversation.

Q. That is all he said at that time?

(Testimony of Ross H. Wood.)

A. I believe so.

Q. And you gave him a clear draft for the amount of the purchase price of these hops?

A. Either that day or the next, I am not sure.

Q. On whom was that draft drawn?

A. On H. L. Hart.

Q. The man for whom you had purchased them?

A. Yes, sir.

Q. Did you make the contract of purchase?

A. Yes, I bought them from Mr. Edmunson.

Q. Upon what did you agree to pay him?

A. How much a pound?

Q. Yes.

A. Let's see. I believe it was 14 and 10 cents.

Q. Was that the price agreed on at the time you agreed to buy them?

A. Well, I am not sure. I believe, according to the samples we bought those hops on, a price of 10 cents was on part of them.

Q. Yes. But you had these samples when you made the offer, didn't you?

A. I had the original samples I cut out, yes.

Q. When you made an offer, and you offered him 14 cents for the whole lot on that sample?

A. Yes.

Q. Then when you went and inspected the hops you cut him down to 10 cents on 103 bales and down to 8 cents on another lot?

A. On the poorer hops; we took them in at the

(Testimony of Ross H. Wood.)

price, yes.

RE-DIRECT EXAMINATION

Q. Why did you cut them down?

A. Well, the hops were not like the samples we had. They were poorer.

Excused.

Plaintiff rests.

John M. Edmunson, defendant, being called as a witness in his own behalf, being duly sworn, testified in substance as follows:

That he is defendant in the case, and the other defendant is his mother, and his mother had nothing to do with the running of the yard; had no interest in the contract; he had purchased the property and it belonged to him; she still held the title; he had been in the hop business since 1890; he had raised hops for a long time, and for the last ten or fifteen years had been mixed up with dealers one way or another, sampling and doing some inspecting; that he looked after the cultivation of these hops himself; did a great deal of the work in the yard alone.

Q. Now state about the care that you used in cultivating your yard, in what manner?

A. Well, I usually cultivate the yard according to the common custom they use in producing hops. I have carefully cultivated and sprayed and attended to them in every way in order to produce a good crop, get a good crop.

Q. And about picking?

(Testimony of John M. Edmunson.)

A. Well, I was unusually particular on the picking on account of the contract I had, because the market was lower than the contract price.

Q. Did you exercise personal supervision over your yard and the drying and picking of your hops?

A. Yes, sir.

Q. Now, testify as to the manner in which you dried your hops and the care you used.

A. Why, I dried them in the usual way, the usual manner that they use in drying hops to put up a good sample.

Q. How many hop houses did you have?

A. I had two houses, which contained three floors, one double house and one single house.

Q. And how many acres?

A. About 30 acres in hops.

Q. There has been some intimation here in the testimony that you might have overloaded your kilns in the process of drying. What is the fact about that?

A. I never do overload the kilns.

Q. How deep, generally, did you bank the hops in laying a floor for drying?

A. Oh, sometimes 20 inches; sometimes more, sometimes less. That would depend on the day's picking to a certain extent.

Q. And also it would depend somewhat on the nature of the weather, wouldn't it?

A. Yes, on the nature of the weather, and also

(Testimony of John M. Edmunson.)

on the time that you would take to dry them. To dry a big floor you would take more time; to dry a small floor doesn't take so much time.

Q. Did you use the same houses that you had always used?

A. Yes, sir.

Q. Did you ever have any trouble before about smoking the hops while drying them, or stewing them?

A. No, I never had any trouble whatever with smoke or anything like that in all my experience in drying hops in those houses.

Q. Now, what is the fact as to whether you dried these hops in question in the same manner that you had always dried your hops?

A. Well, I use the same process; run about the same heat ordinarily.

Q. Now, what is the fact about your hops falling down in the yard during the picking season? Did they fall down to any extent?

A. Not to any extent. There were some yards broke down some; some wires broke. But it didn't let the yard down on the ground. That is, it didn't let the hops down on the ground. It didn't go low enough.

Q. What is the fact about hop raisers, during hop picking time, usually having more or less difficulty of that kind always?

A. Well, during wet seasons they are liable to

(Testimony of John M. Edmunson.)

break any time. The wire is liable to snap and the hops come down on account of the heavy rains, heavy weight coming on the vines.

Q. Now, how is your hop yard wired?

A. Well, there is about 23 or 24 acres of it, something like that, is on a wire trellis, and about six or seven acres is on the old fashioned pole system—a pole to every hill.

Q. Now, there is some testimony here that Mr. Hinkle and Mr. Hayes went up to Goshen same time about the first of October to examine the hops raised by you, in 1912. You may state now what took place there at that time.

A. Well, they came up there on about that date, and I met them by appointment at Goshen for the purpose of inspecting the hops under the contract. And we went over to the warehouse, got the keys, I think, from the depot man or the warehouse man; opened it up, and went in. Mr. Hinkle pulled down a couple of bales and took two samples, one from each bale; looked at them; took up a little time and told me that they could not take the hops on those samples on the contract; could not take the hops. And I told him I supposed that he was there to inspect the hops, and asked him if he intended to reject the hops on the two samples. And he said that was all he could do. We had some more conversation about the inspection. I wanted him to inspect them at that time, and he refused to inspect them—said they had

(Testimony of John M. Edmunson.)

a lot of work or something. I told him that I would like to have it done because I was in a hurry to get the thing off my hands. I had kept them now for quite a while. The market was going down and I wanted to get rid of the rest of the hops. I had more than the contract called for; and they had the privilege of selecting from the whole bunch, from all the bales. I could not sell the extra hops left over without they had selected—they had to make their selection first, as I understood the contract.

Q. Now, was there anything said there about selling the hops?

A. He told me that he could not take the hops, and I asked him what he could do. I expected maybe that he had in view they might handle the hops in some way. And he said no, they could not handle the hops at all. He advised me then to sell the hops to someone else. And after that we had a private conversation together, and he demanded the money back on the—he demanded the advance money back.

Q. That was on the 3rd of October, was it?

A. It was on the 3rd of October.

Q. Now, was there anybody present with you and Mr. Hinkle when he demanded that money back?

A. There was not.

Q. Where were you?

A. We were out on the porch together, by ourselves—the porch of the warehouse.

Q. Now, what did you tell him when he said to

(Testimony of John M. Edmunson.)

you that you could sell the hops to some other parties and demanded the money back?

A. I told him that I could not pay the money back.

Q. Well, what was said, if anything, by you as to the quality of the hops?

A. I told him I thought I had hops good enough to fill the contract, a sufficient number of them.

Q. Then what did he say about that?

A. Well, he didn't say anything that I remember. He said he didn't do the grading. They did the grading down there at the office at that time. He also said if the hops ran prime, why, he would take them on the contract.

Q. What was your last remark?

A. He also said if the hops were prime he would take them on the contract at that time.

Q. And then what did you do?

A. Well, that was about all there was done or said at that time. He and Mr. Hayes returned down to Eugene, I think.

Q. Well, were you sick that day, or complaining?

A. No.

Q. Please speak out.

A. No, I was not sick.

Q. Did you have any conversation after that and during the same day with Mr. Hinkle?

A. Yes. When I got back home, it was about

(Testimony of John M. Edmunson.)

noon, I think. He called me up from somewhere below, perhaps Eugene, said he would be back up that afternoon to inspect the hops. And meantime my baby got sick; I had to go after medicine down to a town called Springfield; and while I was on the road after medicine I met Mr. Hinkle. He came up on the train, I believe. I told him to go ahead and inspect them, that I had to go to Springfield and would be back as quick as I could get there. He said he would not do it himself. He caught the next train back for Eugene. That was just between trains he was there.

Q. Now, there is some testimony here to the effect that you told him that you were not in a hurry about having the hops inspected, or words to that effect. Was there anything said by you in that respect?

A. No, I never told him that I was not in a hurry. It was just the reverse. I was in a hurry to get the hops off my hands.

Q. Now, the second time that they were up there, state what occurred then?

A. Well, the second time they came up they came up in a buggy and came down home, called me out, and Mr. Hinkle told me that they had come up to inspect the hops. And I told Mr. Hinkle that I didn't think I would let him inspect the hops because he had regularly rejected them before, and we argued around there for an hour, I suppose; talked about

(Testimony of John M. Edmunson.)

one thing and another, and finally—I hadn't inspected them myself as yet, I didn't know what I had exactly—I told him we might as well go up and inspect them anyway, that we could inspect them in a little while I supposed. And he stated before I made that arrangement that he would take whatever prime hops I had on the contract.

Q. Now, do you know what day of the month that was?

A. That was on the 31st of October, the last day of October.

Q. Now, who else was there with you and Mr. Hinkle at the time of this last inspection?

A. There was not anybody there. Mr. Hinkle and Mr. Hayes and myself inspected the hops.

Q. Was your brother there at all during that day?

A. Well, I don't remember whether he was there that day or not. I don't think he was. He might have been there during the last end. I don't believe he was there that day, though.

Q. What did you do there that day about inspecting the hops?

A. Well, we inspected the hops in the usual manner by taking so many samples, by prodding each and every bale.

Q. Who made the inspection?

A. Mr. Hinkle made the chief inspection.

Q. Did your brother assist in handling the bales

(Testimony of John M. Edmunson.)

at all?

A. No; I don't think my brother was there that day.

Q. Do you know what is the custom in respect to handling bales during the inspection?

A. Well, the warehouse men usually handle the hops—take them down and are supposed to put them up, in the ordinary hop business.

Q. After they had inspected the hops the last time, will you state just what Mr. Hinkle told you about the hops?

A. After he inspected them?

Q. Yes, or during the time he was inspecting them.

A. Well, during the time he was inspecting, why, once in a while we would have a little conversation. I would tell him that he was grading them pretty hard, there was lots of good hops in there; and he would grade them just the same and make no difference. As a matter of fact, when it came down to the point, I asked him why he graded them one way and why he graded them another, and I would ask him also what he called the hops. He said he didn't know what they called them at the office, that they graded them down there. When we went up there he didn't have any samples to match them with. In the grading that they took from the office; didn't grade them on the matched samples that they had received before I sent samples to him about the 15th

(Testimony of John M. Edmunson.)

of September, I think, immediately after I got the hops baled, all those baled that were picked. When I was through picking I was practically through baling and was ready to sell or deliver or do anything I wished. I didn't have a big cooler to keep them in; so that I sent samples of my own—cut them myself.

Q. Now, did you have any conversation with Mr. Hinkle that same day after he had finished the examination of the hops?

A. Yes.

Q. Where was that conversation?

A. That conversation was over in a horse shed.

Q. How did you come to go over there?

A. Well, Mr. Hinkle didn't want anybody to listen to the conversation that we might have between ourselves. We went over there about 50 yards in the mud. We had a little conversation.

Q. Well, now, state what occurred there?

A. Well, he said that he could not take the hops, that they didn't show the quality that he figured they required down below, which meant his office; and that he could not take the hops under the contract, and he demanded his money again.

Q. Well, what did you say to Mr. Hinkle?

A. I told him that I could not pay him the money; that I thought they ought to take most of the hops on the contract, or all the hops; that he hadn't taken a good line of samples to show the office, and I didn't like his inspection.

(Testimony of John M. Edmunson.)

Q. Well, what, if anything, did you say to Mr. Hinkle about handling the hops at that time?

A. How do you mean, marketing?

Q. Under this special provision of the contract that has been called in question.

A. Well, I didn't say anything only that he refused—the conversation was that he refused. He told me that he could not take the hops under the contract; that he would have to reject them; and he could not handle them under any consideration. That was the conversation with reference to taking them under the contract. He said he could not take them under the contract or any other way.

COURT:—Did you and he disagree as to the quality of the hops?

A. At the time of the inspection?

COURT:—Yes.

Q. Now, as I understand you, he told you that he would not take the hops under any conditions whatsoever?

A. That is the conversation.

Q. Can you give the exact words he said in answer to that?

A. He said that he could not take the hops under any consideration, either under the contract or under any other way.

Q. Now, you testify that he demanded back the money. What, if anything, did you say about paying back the money?

(Testimony of John M. Edmunson.)

A. I told him that I could not pay him back the money; that I didn't know what I would do about the money at that time.

Q. Now, were you familiar with the market price of hops during the year 1912?

A. I knew quite a little about the market.

Q. What was the market price of hops during October, 1912?

A. Well, the market price ran all the way from 20 cents down to 15 cents and 14 cents. Some hops were bought in that section for less than that.

Q. Well, what do you mean by running down?

A. The market had a downward tendency. During the middle of October it went down, and then during the last of October it came back a cent or two; and then it went down again immediately after, in November.

Q. What was the market price of choice hops along about the 31st of October?

A. Well, they were worth about 15 or 16 cents up in that section, it seems to me.

Q. What was the market price of prime hops?

A. Well, they would run along about 14 cents—
15.

Q. Now, after Mr. Hinkle had rejected these hops, what did you do about selling them?

A. I didn't hear the question.

Q. (Question read.)

A. Well, immediately after he rejected them the

(Testimony of John M. Edmunson.)

market dropped and commenced to fall. And during the month of November the market dropped down to ten cents and ten and a half and eleven in that section; lots of hops bought in that section at 10½ cents. So that I let the proposition slide, as a matter of fact, and kept the hops; figured that the market would perhaps come back. And it finally did come back. I kept the hops until about the 10th or 12th of March, when I sold them.

Q. Whom did you sell them to?

A. I sold them to Hart, Hart and Company.

Q. Was that just an oral contract you had then?

A. Yes, it was the ordinary sale contract they make between buyers and sellers.

Q. What were you to get for them?

A. I was supposed to get 14 cents for the entire crop straight through.

Q. And were they sold on sample?

A. Yes, they were sold on sample. They had samples out of the crop.

Q. How many samples did they have?

A. Oh, they had perhaps seven or eight samples. They had quite a line of samples out of the crop, more than anyone else.

Q. Now, how long after you made this contract of sale was it until the hops were inspected and taken in by Mr. Hart?

A. Well, I think it was three or four days.

Q. What was the condition of the market dur-

(Testimony of John M. Edmunson.)

ing that time?

A. It fell, from the offers that I received from dealers, it fell at least two cents.

Q. Now, when they came to inspect, state what occurred there at that time.

A. Well, when they came to inspect, they looked through the hops, quite a lot of them, and said that they could not take them at that price.

Q. Did they give any reason for it?

A. Well, they didn't give any particular reason for it, no. They said the quality would not come up to what they figured on, I suppose. The market had dropped meantime a couple of cents. They made no objection to the hops.

Q. Now, what was the market value of hops at the time you made this sale—that is, of choice hops, if there was any market?

A. At the time I made this sale, between 14 and 15 cents.

Q. And what was the market price at the time you delivered them?

A. Well, it was down in that section to along about 12 cents.

Q. Now, when they inspected them and prepared them for shipment, what did they do about taking out samples?

A. Well, they took out—they usually take out about so many samples, about one sample out of every tenth bale. They took it when they inspected;

(Testimony of John M. Edmunson.)

they took out a line of samples; that means about one out of every tenth bale. That would mean something like twenty samples they took out at the first inspection. Then when they came back to ship, a few days afterwards, they took out another line of samples.

Q. What did they call these?

A. They call those the shipping samples.

Q. And where did they place them, now, immediately after they had drawn the sample out of the bale?

A. They had those samples lined up on top of a row of bales that were standing on end, outside of the house. They were standing out on the porch under the light.

Q. Those samples represented the whole crop, did they?

A. Yes, those samples represented the whole crop.

Q. Were those samples separated, as representing different qualities?

A. They were not.

Q. They were all in one line?

A. All in one line, set along in a row.

Q. Now, did you get any of those samples?

A. Yes, I took one of those samples. I picked out what I thought was an average sample out of that bunch of shipping samples and kept it.

Q. Did you ask them for that sample?

(Testimony of John M. Edmunson.)

A. I did.

Q. And you asked them to select one for you?

A. I did at first, asked them to pick me out a good average sample, and they refused to do it. They didn't want to do it, so I picked out one myself, and asked their judgment on it, and they said they thought it was a good average sample of the lot.

Q. Now, what did you do with that sample?

A. Well, I preserved that sample, kept it and used that as part of the evidence in the case that I had.

Q. I mean what did you do with it with reference to finding out the quality of the hops it represented?

A. Why, I had it analyzed.

Q. Where?

A. At Corvallis.

Q. By whom?

A. By Professor Pilkington.

Q. I understand you to say you delivered this sample to him?

A. I sent it to Mr. Pilkington later in the season, about the first of June, to have it analyzed.

Q. Now, there is some testimony offered here by the plaintiff that at the time you sold these hops and received a draft for it, that you said you would make arrangements with plaintiffs about their demand, or settle with them. What is the fact about that?

(Testimony of John M. Edmunson.)

A. I don't remember just what was said about that. I told him, I think, that if there was any settlement to be made at all with Klaber, Wolf & Netter, that I would do it. I think that was the language I used.

Q. Now, did you examine the samples that were taken from your hops at all of these inspections?

A. Yes, I examined most of the samples.

Q. Now, from your inspection of those hops, what would you say as to their quality?

A. I call them a good hop.

Q. What is your opinion as to what quality they were?

A. Well, I considered that I had over 20,000 pounds of choice hops in the lot.

COURT:—Over how many?

A. Twenty thousand pounds. And the rest of the hops would grade prime, with the exception of what they call the rip end. That was the seven or eight bales that they called over-ripe, and the ends of the leaves were turned red.

COURT:—That is the last picking?

A. That was the last picking, your Honor. What they would grade those, I could not say exactly.

Q. Now, there is some testimony here about two of the bales having perished. Have you any explanation for that?

A. There was two bales that we discovered—when Mr. Hinkle and I inspected them—that were

(Testimony of John M. Edmunson.)

hot, from the trying that he took out. And I moved those two bales out, and afterwards I hauled them down home along with some of the other slack hops that he had marked amongst the 30 bales, I think, were marked as slack. And I hauled back 16 bales to the dry house and thought I would re-dry and see how slack they were. So I took the two perished bales along, I believe, as he called them. And when I opened them up I found that the two perished bales were not slack hops at all, but that the roof had leaked on the dry hops where they had been dumped into the cooling room. And when the water struck the hops they all wadded up; and when the boys ran them into the baler they all kept together, stuck together and ran into a wad, were very wet. And I took that part of the bale out and re-baled the rest of the bale—both. There was about half the bales that were destroyed from that water, and the rest of the bale was nice and dry.

Q. You mean half of the two bales, or half of the 16 bales?

A. The rest of the two bales that perished, that were wet from the cooling. And my experience with the other slack bales, supposed slack bales—I hauled them back inside of two weeks after the inspection, and when I cut the twine and opened the bales up and took the burlap off, the hops were nice and dry, and they didn't need any drying. And I rebaled them and brought them back up to the warehouse

(Testimony of John M. Edmunson.)

and didn't haul back any more slack hops. When Mr. Wood inspeted the hops he didn't find any slack hops.

Q. Now, what is your experience with hop inspectors as to their being uniform in their judgment as to the quality of hops?

Objected to as incompetent, irrelevant and immaterial.

COURT:—I think that is an inquiry about the quality in effect of the hops. You may answer.

Mr. Williams:—I desire an exception.

COURT:—Very well, you may have your exception.

A. I find that they vary considerably. One will call a hop prime, and the other medium, etc. They will vary as much as one grade. And some vary two grades.

Q. Well, now, what would be the difference between a hop known as trash and a medium?

A. A prime and a medium?

Q. No; trash.

A. Well, trash, in ordinary hop language, means a hop that has no value at all. They use them sometimes—what they call packers—pack hops in to ship.

Q. Well, now, what would you understand would constitute a medium hop?

A. Well, a medium hop is a hop that does not have very much substance in it. It has a weak, poor, weak flavor, and a poor, weak hop; judge by its fla-

(Testimony of John M. Edmunson.)

vor more than anything else. That is the lupuline that is in it. If it has not much lupuline in it, it is a poor, weak hop.

Q. Now, what do you say as to whether, at the time that Mr. Hinkle inspected these hops on the 31st of October, that you had 30,000 pounds of hops there of the quality described in that contract?

Exception.

Mr. Williams:—Objected to as incompetent, irrelevant and immaterial, and as calling for a conclusion of the witness on this matter.

COURT:—He says he inspected the hops. He can give his judgment as to that amount.

MR. WILLIAMS:—I desire an exception, your Honor.

COURT:—Very well.

A. I considered that I had more than enough hops of the quality that would be sufficient, that would go on the contract. There was perhaps 50 bales or 60, between 50 and 60 bales, hops extra, besides enough. I had over 40,000 pounds, according to my recollection, in the whole crop.

Q. Now, who was it inspected these hops when you sold them?

A. Mr. Wood.

Q. The gentleman who testified here today?

A. Yes, Mr. Wood and Mr. Irwin.

Q. Now, what, if anything, did Mr. Wood tell you about there being 20,000 pounds of hops of the

(Testimony of John M. Edmunson.)

quality described in this contract?

A. Mr. Wood stated to me after the inspection was over that there was 20,000 pounds that should have gone on that contract.

Q. Who was present there at that time?

A. My brother and Mr. Heyer.

Recess until 2:00 P. M.

Portland, Oregon, February 25, 1916, 2:00 P. M.
John M. Edmunson. Resumes the stand.

DIRECT EXAMINATION CONTINUED

Q. Mr. Edmunson, at the time you were negotiating the sale of your hops with Mr. Hart, did you have any conversation with him over the 'phone about the quality of these hops?

A. Yes.

Q. You may state what that was.

A. One day while I was in Springfield I met Mr. Heyer and Mr. Wood, and they made me an offer on the hops; and I figured with them a while and didn't think that I would take it. So Mr. Wood wanted me to talk with Harry, that is Mr. Hart, his partner, over the 'phone. We were in the 'phone office at that time, and he called him up, talked with him and then asked me to talk. So I had a short conversation with Mr. Hart, in reference to the price, etc. And when we got through conversing on that line, I asked him how he graded the hops; and he says he graded them prime.

(Testimony of John M. Edmunson.)

COURT:—That was Mr. Hart's brother?

A. That was with Mr. Hart, of the firm; Harry Hart, that I sold the hops to.

COURT:—Mr. Hart, himself?

A. Yes, sir.

Q. Now, you may state to the jury to what, if any, extent any of these hops were affected by mold.

A. Well, there was about 20,000 pounds of them that didn't have any mold, you might say. I call them free of mold. And the rest of them they ran along gradually until the end of the season, and they had some little mold in them; until the final end, the last day or two of picking, they had considerable mold in them and were over-ripe.

Q. How long were you engaged in picking?

A. About 12 days, I think, that year.

Q. Now, was that a reasonable or an unusual length of time for picking hops?

A. No, that is about the average time for picking of that yard, and about an average season for the country generally; for 12 days to 15 days for most of the years in that section.

CROSS EXAMINATION

On cross examination, Mr. Edmunson testified, in substance:

There was some lice on the hops; that he sprayed the hops along the latter part of July, don't remember the exact date; usually sprayed along the latter part of July, sometimes into August a day or two.

(Testimony of John M. Edmunson.)

I think it was the same time that year. I sprayed them once with whaleoil soap which had naphthalene in it. Don't know how long it took to spray them; usually sprayed five or six acres a day; it would take about a week. Took about as long that year as it would any year. Could not say exactly as to the time, it was either the last of July or into August. When the lice come we usually spray most any time.

It was an awful wet and bad season all summer, and being asked whether lice are worse that kind of a year, than others, said, No, I don't think so, not any worse than some dry seasons. The lice were not very bad that year.

Q. Well, how did it come that there was more mold in the latter part of the picking than there was in the first?

A. Well, the lice—if you will remember that season—I was intending to start about the first of September, and I didn't get to pick many hops for a week. It rained for about three days steady at one time, and kept raining for a week before we could pick many hops. And in the week's time when the hop is about ripe or when it is ripe the mold comes awful fast; and it doesn't come until they do get to a certain stage of maturity.

Q. Then there were lice all over the yard at the time you commenced picking?

A. Well, there was some lice perhaps, on some of the yards, but they didn't show much till the last

(Testimony of John M. Edmunson.)

end of the picking.

Q. They were there, though, from the start?

A. I don't know whether they were or not.

Continuing, in substance the witness said: I never noticed the lice until the mold came on in the latter end. When I found mold, then I found lice. Where you don't find mold, you don't find many lice. The lice will come on in three days and make mold.

Q. When did you inspect those 20,000 pounds you say were practically free from mold?

A. I inspected them with Mr. Hinkle once, and then with Mr. Wood once. I inspected twice, or helped inspect—saw practically every or nearly every bale.

Q. Did you examine the hops while Mr. Hinkle was inspecting them, yourself?

A. Yes, sir; most all of them. I didn't examine every bale. I was carrying tryings out, and Mr. Hayes was carrying tryings out; and I was watching Mr. Hinkle most of the time.

Q. How did you make your calculation that there were about 20,000 pounds that were choice hops?

A. Well, Mr. Wood picked out about 20,000 pounds that he claimed was the best of the hops. I never picked out the exact amount myself, because I was not grading them, but it ran fully that much or more; how much more they would run I don't know.

(Testimony of John M. Edmunson.)

Q. Was that the reason or the fact upon which you base your judgment that there were about 20,000 pounds of choice hops?

A. Which?

Q. Was it on account of Mr. Wood's examination of them?

A. No, I examined them myself, most all of them.

Q. Well, that is what I am trying to get at. When did you examine them yourself?

A. I examined them along with him.

Q. With Mr. Wood?

A. Yes, I was right there all the time.

Q. Yes. Did you keep track of the number of bales?

A. Yes.

Q. That those grades were in?

A. Every bale was marked the way it was graded.

Q. How were they marked?

A. Well, I think—I have forgotten now exactly what mark was put on them. I could not swear to the exact mark.

Q. Do you want the jury to understand that the 20,000 bales of better hops there—20,000 pounds, were free from mold?

A. Yes, sir.

Q. That is your judgment. Now what was your judgment based on?

(Testimony of John M. Edmunson.)

A. My judgment was based on my inspection. I inspected them twice.

Q. Personal inspection?

A. Yes, sir.

Q. You didn't see any mold in them?

A. No, sir.

Q. Do you want the jury to understand those 20,000 pounds were even in color?

A. Yes, sir.

Q. Upon what do you base your judgment on that?

A. Well, I saw them with my own eyes.

Q. How were they about being mature, that 20,000 pounds you say were choice hops?

A. They were fully matured.

Q. And upon what do you base your judgment on that?

A. For the simple reason that they had attained their full growth, and if they had been left on the vines for a week or ten days longer they would have been like the latter end of the crop, what they call over-ripe.

Q. Now, were there any over-ripe hops in that 20,000 pounds?

A. No, sir.

Q. On what do you base your judgment on that?

A. I could not find any over-ripe hops, and besides, they were the first picking.

Q. How do you know those were the first pick-

(Testimony of John M. Edmunson.)

ing.

A. Because I picked them first.

Q. Did you mark the bales that you picked first?

A. I baled them up, yes, sir.

Q. How did you mark the bales?

A. I didn't mark them at all; I baled them out as they dried. They could not help being the first picking.

Q. How do you know that, if you didn't mark them in any way?

A. I know it by the color and the fact that they didn't have any mold in them.

Q. Now, upon what do you base your opinion that the hops were properly dried and cured?

A. Well, I have dried for twenty-odd years, I guess. I have had lots of experience along that line; and I dried—always had good success. My hops pass through on inspection always.

Q. Is that upon what you base your opinion that these were properly dried and cured?

A. Well, I dried them myself and examined them afterwards, and they were in good condition.

Q. You base that upon your examination of these particular hops?

A. Yes, sir.

Q. That they were properly dried and cured?

A. Yes, sir.

Q. And these 20,000 pounds were not affected by spraying or vermin damage?

(Testimony of John M. Edmunson.)

A. No, sir.

Q. Now, how about the second lot, John?

A. Well, the second lot had a small amount of mold in them. That was all the difference. They were really a ripper and better hop.

Q. There was some mold in the second carload?

A. Yes.

Q. Sufficient to make them take a lower grade?

A. No, I don't know. It is the way I graded them, anyway. They were a good prime hop, and a prime hop is not supposed to be perfect.

Q. Were they of even color?

A. Yes, they were all of one color.

Q. What color were they?

A. Well, they were a greenish color, green hop. It was a wet season, and everybody most raised a green hop that year.

Q. Now, were the second lot fully matured?

A. Yes, sir.

Q. Were any of them over-ripe?

A. No, sir; not only the last few bales.

Q. Were they cleanly picked?

A. Yes, sir.

Q. Were they properly dried and cured?

A. Yes, sir.

Q. But they were affected by mold?

A. They had some mold in them, a little bit; not very much.

Q. Well, can you give the jury any idea of what

(Testimony of John M. Edmunson.)

you mean by very little; not very much?

A. Well, it is mold that you would scarcely notice. There were enough hops left after the 20,000 with very little mold in it to fill the contract. Of course, there was a leeway there of 50 or 60 bales that had some more mold, some of them did, where it got along toward the end.

Q. If they had taken enough, aside from the 20,000 pounds to fill out the contract, they would have had to take hops in which there was some mold?

A. There might have been some mold in it, yes.

Q. Or vermin damage?

A. No, they were not damaged.

Q. Well, mold is vermin damage, isn't it?

A. Well, it don't damage anything until a certain stage in the hop business.

Q. When does that stage come about?

A. That stage comes about when they get over-ripe and the flavor leaves the hop.

Q. What effect does the lice have on the hop?

A. It doesn't have any effect on the hop.

Q. What do you spray them for lice for, then?

A. To keep them from having, keep them off the hop, so that if the wet weather come they might affect the hop. I have hops this year that is not affected by lice, no mold—

Q. I am asking you how lice affect the hop.

A. That is problematical. There is a question whether they affect them at all.

(Testimony of John M. Edmunson.)

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(Testimony of John M. Edmunson.)

Q. Oh, it is?

A. The atmosphere might affect the hop.

Q. The lice is what you call vermin, isn't it, in this contract?

A. It is commonly accepted as a vermin proposition, yes.

Q. If the lice gets in there and eats into the hop, it does some damage to it, doesn't it?

A. Well, I don't know. That is questionable.

Q. What?

A. That is questionable whether they damage or not.

Q. You mean by that, it is a question in your mind, or a question in the minds of hop men generally?

A. Well, I don't know. It is a question in my mind. I don't know what the minds of other people are.

Q. Well, there is a general opinion among hop men about the effect of lice upon the hops, isn't there, John?

A. Well, you have heard all kinds of opinions about that.

Q. Well, isn't there a general opinion that the lice do damage the hop?

Q. Well, at a certain time, when they mildew, or mold comes on so strong that they would spoil the hop, why then they are supposed to do the damage.

Q. What is it that brings on the mildew or mold?

(Testimony of John M. Edmunson.)

A. Well, I don't know. It is some kind of a fungus growth.

Q. You are not an expert, then, on the question of the effect of lice in hops?

A. Well, I could not say exactly whether I am an expert or know enough about it to know just what the effect is chemically or physically or any other way. I have seen things mildew where there was not any lice. I have seen things rot and spoil without the presence of any lice.

Q. Did you ever see mold in a hop where there were not lice on the yard?

A. Well, I have found mold in hops that I could not find any lice in.

Q. Well, the lice had died by that time, hadn't they, disappeared?

A. How?

Q. It was after the lice had died and disappeared, wasn't it?

A. I don't know anything about that, whether there was lice there and disappeared or not. I could not tell whether it was fungus growth or whether it was caused by lice.

Q. Did you base your judgment on these 20,000 pounds being choice hops, upon Mr. Bolam's testimony generally?

A. Oh, no. I didn't take much stock in Mr. Bolam's testimony.

Q. You don't take much stock in the testimony

(Testimony of John M. Edmunson.)

of any of these gentlemen, do you?

A. Well, they don't agree right together. I have got as good a right to my opinion as they have to theirs.

Q. I see. Now, you testified a while ago that you had 30,000 pounds of hops that would come within the definition of first quality hops in the contract. How did you arrive at that conclusion?

A. Well, I arrived at the conclusion that the hops were sufficiently merchantable to come under the terms prescribed under that contract, for the simple reason that when I wrote that contract Mr. Zeller and myself agreed on first quality as meaning prime, when I signed the contract; I was satisfied that the hops came within that provision. As far as a first quality hop is concerned, I don't know what it is. It is not in the hop trade. They don't use it.

Q. You read the contract all over before you signed it?

A. No, I read some of it over.

Q. Didn't you read it all over, John?

A. No, I don't think I did.

Q. Why didn't you read it all over?

A. Well, I think that I had read most of it some time or other. I have had a contract or two like that before, whether I read this one over. I know we read the terms of the qualification of the hop over. We had a discussion upon that, and agreed upon what a first quality would mean. Mr. Hinkle, when he came up,

(Testimony of John M. Edmunson.)

agreed to take prime hops on the contract; when he inspected them, he couldn't find any prime hops.

Q. You have been in the hop business, you say, since 1890?

A. Yes, sir.

Q. What other employment have you been in since that time?

A. Oh, I have been mixed up for a year or two at a time in other things.

Q. Practiced law some?

A. Yes, pettifogged a little.

Q. Been admitted to practice law in the State of Oregon?

A. No.

Q. What state?

A. Montana and Washington.

Q. When were you up in Montana and Washington?

A. Eighty-eight and '9, '89 I believe, I was admitted.

Q. What school did you attend?

A. I never attended any school.

Q. Never attended any?

A. Any law school, you mean?

Q. No; any literary institution?

A. Oh, I graduated from the State University here in 1896.

Q. In 1896?

A. Yes, sir.

(Testimony of John M. Edmunson.)

Q. How long were you in school there?

A. Six years in the University.

Q. Then you were raising hops while you were going to school?

A. Yes, sir.

Q. Was it before that that you were admitted to practice law?

A. Before that?

Q. Yes.

A. Oh, no; it was quite a while after that.

Q. It was '98 and '99 you were in Montana, wasn't it?

A. Yes, I was up there about a year in that country.

Q. Now, with reference to this spraying, John, in the other trial of this case, were you not asked this question: "What did you spray them with?" And the answer was, "Soap." And the next question asked you, "What else?" Your answer was, "That is all I used."

A. Well, I think I used the naphthalene in connection with it.

Q. Then your testimony there was not correct?

A. Well, it might have been. I think that I used the naphthalene with it that season.

Q. And the next question was: "All you used was soap?" And your answer was: "Yes." Did you give that testimony at that time?

A. I gave it there if it is correct.

(Testimony of John M. Edmunson.)

Q. Then the next question was: "What time did you spray?" Your answer was: "I don't remember the exact date; along about the first of August, I think."

A. Well, that is perhaps correct. I could not swear within a week of it, or two weeks of it, now.

Q. Then the question was asked you: "Isn't it a fact that you didn't spray until after the first of August?" And your answer was: "I said I commenced to spray along about the first of August. I don't remember the exact date." That was your testimony there. Now, you testified a while ago about the conversation between you and Mr. Hinkle on the first occasion that he was at the warehouse to inspect the hops, somewhere from the first to the third of October, and you stated, I believe, that he made a request for the return of the advances at that time. Was that right? What did he say about that?

A. Well, he said he wanted—he would have to reject the hops under the contract, and he wanted the money back. I don't remember the exact words he used, but that is the effect of the words, as I remember. In other words, he demanded the money back, but what language he used I could not say exactly.

Q. Where did that conversation occur?

A. That conversation occurred outside on the porch of the warehouse.

Q. Who was present at that time?

A. There was not anybody present at that time.

(Testimony of John M. Edmunson.)

Q. Wasn't Mr. Hayes there at that time?

A. Mr. Hayes, was there, but he was not present to hear the conversation.

Q. Now, isn't it a fact, John, that Mr. Hinkle told you then that unless your hops were better than those samples, they could not be taken under the contract?

A. Well, I don't remember all the language we used. We talked quite a lot there. The effect of the conversation was that he rejected them, rejected them on those two samples, that is what he did.

Q. Well, now, just state to the jury what he said about rejecting the hops.

A. He said that he could not take those hops on the contract.

Q. Was he referring to the two samples alone, or all of the hops?

A. The office had samples that I had sent to them along about the middle of the month, or middle of September, as quick as I got through baling or picking, almost. They had more samples than that a good deal.

Q. Now, those samples that you sent down there long before that, which part of the crop were they taken from?

A. I don't remember. I just was up one day and had a sample or two, and I pulled out some samples, wrapped them up and sent them down. They were at, I think it was the last end of the hops. I

(Testimony of John M. Edmunson.)

took them out of the last bale I piled in. I had them stored in Goshen, or I hauled them up there, as I baled, away from the hop house, and piled them in. And the first bales were back over underneath.

COURT:—At this time you say he told you that he could not take those hops under the contract? Did he specify in particular that he could not take them as first quality hops, or did he say he would not take the hops at all?

A. Well, he said that he could not take the hops at all. And I asked him what he could do with the hops, then; and he said that the firm could not handle them at all under any consideration. That was the conversation.

Q. That is not what he said about it, was it?

A. That is what he said. He advised me to go ahead and sell them to somebody else if I could.

Q. Now, what was said about these advances in connection with that conversation?

A. Well, he said that he wanted, expected me to pay the money back; wanted the money; that was what he was after.

Q. What reply did you make to that?

A. I told him that I could not do it at that time.

COURT:—Was that the first conversation?

A. That was about the 3rd of October; the first conversation we had when he took out the two samples.

Q. Well, now, was he insistent on it, your pay-

(Testimony of John M. Edmunson.)
ing back the advances at that time?

A. Well, he put it up in a business way. I don't know whether he was insistent or not. He gave me to understand that he wanted the money; that he could not handle the hops under any consideration at that time; advised me to sell them to somebody else. And I went to work and pulled out some samples that evening and sent them off to the other dealers.

Q. Well, now, according to your judgment at this time, if you had sent in samples from the last end of the picking they ought to have been rejected, hadn't they?

A. Well, that depends upon what last end you refer to, how far you go back.

Q. Well, didn't you testify that those samples you sent down there were from the last end of the picking?

A. Well, I think they were from the last end, yes; some of them.

Q. Haven't you testified here that the last end of the picking were the fullest of mold?

A. Yes, it had more mold in it, as they went along, more and more.

Q. If you sent any samples, then, from the last end of the picking, they ought to have been rejected, hadn't they, under the contract?

A. Well, I don't know as to that. That is a matter of opinion.

(Testimony of John M. Edmunson.)

Q. You admit yourself that they had vermin damage in them, don't you?

A. Well, I was not doing the inspecting and work for them. I couldn't say whether they ought to have been rejected or not. That was their business, to come up and inspect the hops. The contract called for it.

Q. They were full of vermin damage, though, those first samples you sent down?

A. I don't remember whether they were or not.

Q. Did you examine them yourself before you sent them in?

A. I never examined the samples. I pulled them out in the hop-house or in the warehouse, wrapped them up, took them over and shipped them down.

Q. Now, with reference to those advances, John, I will ask you if you were not asked this question at the other trial in Eugene: "Did you agree at any time directly to pay back the \$3,000.00 after they rejected the hops?" And that your answer was: "I never agreed to pay back any money at all. He didn't press the matter on the first occasion; on the second he demanded it." Was that your testimony?

A. That is perhaps right. If this is that way, that is just about the way it was, I guess.

Q. Now, how many firms did you send samples to in October?

A. Oh, I don't know. I didn't keep any track

(Testimony of John M. Edmunson.)

of it.

Q. You sent some to the Seavey Hop Company, didn't you?

A. Yes, I think so.

Q. And some to Harry L. Hart Company?

A. Yes.

Q. Some to the Livesley Company?

A. Yes.

Q. What did you send them the samples for?

A. To sell the hops on.

Q. That was in October?

A. Yes.

Q. What kind of grading or report did you get from Harry L. Hart Company?

A. I got a grading of prime from Harry L. Hart.

Q. When was that?

A. One day when I was in Springfield, along about the first of March.

Q. That was a conversation over the 'phone?

A. Yes, sir; that is the only grading I heard on them at any time.

Q. Didn't Mr. Hart tell you how many he thought were prime?

A. He said the crop would grade prime. I asked him what the crop would grade, and he said prime. That is all I know about it.

Q. Just give the jury an idea of the quality of the hop that you consider constitute the grade.

(Testimony of John M. Edmunson.)

A. Well, I don't know what grade you are talking about. What grade do you want?

Q. First grade; first quality hops.

A. I don't know; I could not grade a first quality hop.

Q. Why not?

A. Because I don't know what a first quality hop is.

Q. Well, what is a choice hop, then?

A. Well, a choice hop is supposed to be about the next grade to the best hop that is grown.

Q. What is the best hop that is grown?

A. Fancy, the hop dealers call it.

Q. Well, give the jury some idea of what a choice hop is.

A. Well, a choice hop—do you want me to define a choice hop?

Q. Yes, I want you to tell me what the qualities of a choice hop are.

A. Choice hop is a good, rich hop, picked fairly clean, and has a good flavor. The richer and fatter it is, the better the hop is. It can be any color so long as it has a rich flavor, rich lupuline in it, which makes the flavor.

Q. How about the evenness of color?

A. Oh, that doesn't make any difference, so much. If it has got the flavor and the richness, why they take them. To define a hop they call choice, it can run through a red tip or green hop or yellow

(Testimony of John M. Edmunson.)

hop, or any kind of a color you want. The main thing about a hop is for it to have a guts in, as the people say.

Q. If there is any mold in a hop, will it be a choice hop?

A. Yes, it can be a choice hop if it had mold in.

Q. If it is just medium picked, what grade would it be as to picking?

A. That depends altogether on the market. If the market is strong, they don't take into consideration picking and a lot of other things. It is pretty hard to grade a hop. The market has more to do with the grading than anything else.

Q. If the price of hops were up to 35 cents for choice hops, wouldn't the picking have something to do with the grading of the hops for the purpose of determining the market price?

A. For a choice hop? No, when prices go up that high, they don't make much distinction. I have sold the rottenest hops I ever raised for the best price. That is my experience—the high price obliterates distinction in grades and qualities.

Q. What year was that?

A. Oh, that was along about 1903 or '04, some time like that. I have forgotten.

Q. Why were they rotten?

A. Why, there was a lot of bales got damp, and there was some hops in there I had to throw off before another floor got hot, and was thrown off slack.

(Testimony of John M. Edmunson.)

One bale weighed, one floor on a 24-foot house weighed about a ton and a half of dried hops, about 13 or 14 bales.

Q. Then you were not an expert drier that year?

A. Well, that was expert drying, because I spoiled one floor some in order to save another. If I hadn't been an expert, I would have spoiled both floors.

Q. How much mold can there be in a hop and still be a choice hop?

A. Oh, a choice hop cannot have very much mold in it. A choice hop can have fly specks and all that.

Q. What do you mean by fly specks and all that?

A. It is mold that looks about like black pepper when you scatter it out, scatter it through the hop. Dealers don't pay any attention to it.

Q. What dealers do you mean, that don't pay any attention to fly speck mold?

A. Hop dealers.

Q. All of them?

A. Yes, all of them.

Q. Did you ever inspect any hops yourself, John?

A. Yes, I have inspected a few.

Q. Whom for?

A. I have helped inspect a good many for Klaber, Wolf & Netter, different seasons.

Q. Did they take them on your inspection?

(Testimony of John M. Edmunson.)

A. No, I assisted Mr. Hinkle that year.

Q. What?

A. I assisted Mr. Hinkle one year. I helped him inspect a good many of them.

Q. Well, they took them on Mr. Hinkle's judgment, and not on yours?

A. Oh, yes; that is what he was there for. He was their head inspector. I didn't expect them to.

Q. Does mold injure the flavor of the hop?

A. No, I don't think it does, only at a certain stage, when it gets to rotting.

Q. What do you mean by a certain stage?

A. Well, a mold gets into a hop; it will collect dampness in a certain stage, and the hop will rot on the vines when it gets to that stage; why, then the hop is spoiled. Before that stage mold does not hurt the flavor.

Q. What becomes of the mold then?

A. I don't know; it dries away, most of it.

Q. Why is it, then, that they grade hops down that have mold in them?

A. Well, I don't know any reason for grading a good hop down that is rich and got a good flavor and color and all that kind of stuff. Very often the dealers grade them down to take advantage of the grower. It is a trick of the trade. I have been up against that a good many times.

Q. Now, at the time of the second inspection of the hops there in the latter part of October, were you

(Testimony of John M. Edmunson.)

present all the time that Mr. Hinkle was inspecting the hops?

A. Yes, I was right by there.

Q. How many bales did you examine samples in that Mr. Hinkle took out?

A. Oh, I examined most all of them.

Q. What did you do in examining them?

A. Why, I looked at them, looked at the berry, watched him examine and open and inspect; while I was away getting some samples he was inspecting two or three more. When I came back I would look at those. So I saw about every bale that was inspected.

Q. Just tell the jury what you did when you inspected them.

A. Well, I matched them up, looked around to see how they would grade; rub them up.

Q. Smell of them?

A. Smell of them; go through all the motions of a regular dealer.

Q. Did you do that with all of the bales?

A. Yes, sir; just about all the bales. I was watching the inspection pretty close at that time. It was my business.

Q. Did you point out any bales to Mr. Hinkle that you considered first quality hops under the contract?

A. I pointed out lots of good bales to him.

Q. How many?

(Testimony of John M. Edmunson.)

A. I don't remember how many. I didn't fight with him over the inspection.

Q. Yes?

A. What I would say or do at that time would not have any effect on him. He was working under orders and instructions from his firm, I suppose; not under mine. I made several objections and comments along as we went, called his attention to some samples, some tryings. He seemed to be pretty tight on it. He didn't loosen up.

Q. Then you and Mr. Hinkle only differed over a few of the bales. Is that the idea you want to convey to the jury?

A. Only differed on a few of the bales? We differed on a whole bunch.

Q. Well, did you, as you went along inspecting the bales, point out to Mr. Hinkle the ones that you considered choice hops?

A. I pointed out several of them to him.

Q. Well, how many?

A. Oh, I don't know; two or three or four dozen maybe.

Q. Two or three or four dozen?

A. Yes.

Q. That would be 40 or 50?

A. Yes.

Q. Was that all?

A. I don't remember how many I did point out. I didn't quarrel with Mr. Hinkle over every trying

(Testimony of John M. Edmunson.)

that came up.

Q. You and he agreed on a great deal of it, then?

A. We didn't agree on any of it.

Q. What do you mean, then, by stating that you didn't quarrel with Mr. Hinkle over it?

A. Well, there was no use of quarreling with him over it. Mr. Hinkle—I had known him a long time and helped him out. He was doing the inspecting for his firm. I was not. I didn't belong to the firm. They had Mr. Hayes there that year, I think.

Q. Well, I will ask you again to give the jury as near as you can possibly do so, an idea of how many bales you claimed to Mr. Hinkle there came within the definition of this contract?

A. I claimed that enough bales were there to fill the contract; told him so at the time.

Q. How many did you point out to him?

A. Oh, I don't know how many I pointed out. I could not say exactly about that. I don't remember. We were working pretty hard there. There were only three of us inspecting, and we had to handle the whole business; on top and on the bottom, and move them back and forth. It was quite a job.

Q. You did point out, you say, two or three dozen?

A. I pointed out a good many—sufficient, I thought, to call his attention to the fact that I didn't agree with his inspection, and that was as far as I had any desire to go that time, it didn't make any

(Testimony of John M. Edmunson.)

difference.

Q. I will ask you, John, if you were not asked this question in the previous trial of this case: "Did you point out any bales to Mr. Hinkle that you insisted were first quality hops?" And if you didn't answer this: "I didn't point out any bales. I told him that was a good hop that he was inspecting. And he passed it up; said it was not. That ended it so far as that bale was concerned." Is that your testimony in the previous trial in this case?

A. Yees; that is my testimony. I didn't pick out the bale. Sometimes I didn't handle the bale. Mr. Hayes brought out tryings, etc. I didn't know which bale they came out of. It was the tryings that we were inspecting. I didn't pick out the bales; that is, only in that way, indirectly.

Q. Now, you say that there was a row of samples put outside by Mr. Wood and Mr. Irwin, shipping samples, and that you took one of them.

A. Mr. Wood and Mr. Heyer did that work.

Q. Did you send more than one sample to Pilkington?

A. I think so; I think I sent two samples.

Q. Now, in the previous trial of this cause, in identifying the samples that you sent to Pilkington, weren't you asked this question: "Identify the one that you say Wood drew out, the first one you testified about." And your answer was: "That was this sample here, I think. He drew both the sam-

(Testimony of John M. Edmunson.)

ples out. Wood and Heyer pulled two samples; one was a shipping sample and one a test sample, when they inspected the hops the first time; and they re-sampled, and I got another sample." Weren't you asked that question? Wasn't that your testimony in regard to that sample?

A. I suppose so.

Q. Then you were asked this question: "What did you request Wood to do?" Your answer was: "I told him I wanted to get an average sample." Is that your testimony? Then you requested them to pull that sample for you that you sent down to Pilkington.

A. Oh, I don't know whether I requested them to pull it for me. They were pulling out a full line of samples to ship off, and I told them I wanted one.

A. Yes; that is my testimony. I didn't pick. They pulled the samples. Whether I requested them or not I don't remember. Possibly I did. Possibly when they were taking one out of one bale I asked them to pull another out of the same bales. I would not swear to that.

RE-DIRECT EXAMINATION

Q. Mr. Edmunson, you testified that you sent samples to dealers around over the state in October?

A. Yes.

Q. Was that before or after Mr. Hinkle's first inspection?

A. I think that was after; I am not sure.

Excused.

(Testimony of Frank S. Johnson.)

Frank S. Johnson, being called as a witness on behalf of defendant, testified in substance:

Residence, Portland, Oregon; hop dealer by occupation; have had experience in growing hops since 1890; helped my father, who was one of the oldest hop growers in Marion County. In 1890 I ran a yard of my own, that is a rented yard; had experience as a dealer since 1895. I worked on the dealing end, on the road. Was connected with Henry Oppenheimer first; Wolberg; Phil Neis; then I went into partnership with J. W. Seavey under the name of Seavey Hop Company for eight years. I had experience during that time in inspecting and grading hops. Am acquainted with Mr. Edmunson, have known him twelve years or more. Examined samples of his crop of hops for the year 1912. Every year he would always send his own samples down. We never sampled his hops that year, that is up by Goshen. Whether it was four or six samples I don't remember, but I know I graded them as I graded all the hops as they came in. Received samples of his hops in the fall of 1912. Went through the usual form of all the samples that I had. When they would come in, enough to work on, I would take them out on the table and examine them and the bookkeeper, when I would give the grading, would enter them in the books. They were in three grades; there were three lots, I should say. He sent one sample like 140 bales, one 75 bales, and the third 40 bales. That is the way our books show.

(Testimony of Frank S. Johnson.)

The first grade was medium, the 140 bales, the 75 was medium and moldy, and the third was 40 bales medium slackish, that is the way we have it, and there were 16 bales of baby hops, but of course that is all destroyed, all the grading we put on baby hops, that 16 was part of the 40.

Examined what was called shipping samples. We looked at some samples there in the room. I don't remember whether they were out of that lot or what they were.

CROSS EXAMINATION

Question by Mr. Williams:

Q. When did you receive the samples of the Edmunson hops?

A. Well, I could not say. Of course that is a long time ago. I judge it was along around November 1st, something like that. I would not say.

COURT:—1912?

A. 1912, yes.

Q. How many bales did Edmunson have that year?

A. Well, I don't know. It is—according to the book there, it would be a little over 250 I should think. But many times when they send the samples in the bales are guessed at; and when they are weighed up on inspection we find it is not the correct number, many times.

Q. Now, these hops that were graded as medium, what was wrong with them that you didn't grade

(Testimony of Frank S. Johnson.)

them up to the first quality?

A. Well, that is something that I cannot remember now. All I would have to go by is the book.

Q. What are the various grades of hops according to quality?

A. Oh, say common and medium; medium to prime; prime; prime to choice; and choice, is what is customary.

Q. Then there is choice and the prime, and an intermediate grade between choice and prime, is there?

A. Well, that is used by the dealers. Where there is a right good prime, they sometimes say prime to choice.

Q. Where there is no close question about it?

A. Yes.

Q. And then below primes come mediums?

A. Below primes is medium to prime; that is another.

Q. A medium to prime is the half grade?

A. Yes.

Q. Now, there was not any of the Edmunson crop that you graded above medium, was there?

A. Not according to the grading, no. I had the book to go by.

Q. Is this the book that you used in the office?

A. Yes, sir.

Q. Do you find Mr. Edmunson's grades there?

A. Yes, sir.

(Testimony of Frank S. Johnson.)

Q. They correspond with your testimony, do they not?

A. Yes, sir.

Q. 104 bales of medium; and then 75 bales of medium, moldy; and 40 bales?

A. Medium slackish.

Q. And 16 bales of baby hops?

A. Yes.

Q. What grade do you say those baby hops are?

A. Well, we hardly ever put any other grading; just call them baby hops. They are always green, you know.

Q. Then if there were more bales here than Edmunson had that year, there must have been some mistake somewhere in the number of bales?

A. Well, I should think so. Those number of bales should have come from the samples. I don't see any other way they would get on that book, without we was taking them from the samples.

Q. You didn't have 140 samples of medium hops, did you?

A. What was that? I didn't understand that.

Q. You didn't have 140 samples from the 140 bales of medium hops, did you?

A. No, there was not over four or five, six samples, I guess, that he sent in; that is all.

Q. You just estimated the number of bales of that quality?

A. No; I believe that the samples as they came

(Testimony of Frank S. Johnson.)

in must have been samples representing 140 bales; and so many samples representing 75 bales. I think that must be the way that was put in that book.

Q. Well, now, how would they' represent more than one bale, the one bale they were taken from?

A. Well, many times as they bale out they estimate; well, they baled at the first baling which was done, I judge 140. It might not have been that way. It might have been 75 they baled first. You could not tell.

Q. These samples were not sent you as they were baled out, were they?

A. They were all sent at the same time.

Q. Were they sent as they were baled out from the hop house?

A. I don't know that. They came to us, I think, about November 1st, some time there; I would not say surely.

Q. Now, isn't it a fact, Mr. Johnson, that in sending samples they will select out or take ten bales of hops, or about that number, and take one sample from the ten bales, and let that sample represent the ten bales, without any examination of the other nine bales?

A. Well, they do that in inspecting sometimes; and especially in shipping to London, they will string them out in a row and inspect all the way down the line; and then every tenth bale they will take a sample out and send it as a shipping sample. But of

(Testimony of Frank S. Johnson.)

course if it don't run, they don't let it go in.

Q. Who sent you these samples?

A. Mr. Edmunson sent them.

Q. You don't know whether he stuck his tryer in and pulled out some?

A. No, I don't know anything about that.

Q. And selected the bales to represent that sample?

A. No.

RE-DIRECT EXAMINATION

The witness' attention was called to testimony he had given in the previous trial of this case, when samples of the hops were submitted to him; he testified in substance: I remember several samples that were put before me there, and I believe that I said one I would consider to be prime, and I also said, of course, to judge hops in that court room, which was probably darker than this one, and it is necessary to have a steady light, like sky-light, to look at hops. After a colloquy between the attorneys and the court with reference to his testimony, the Court asked: Do you remember what you testified to at that trial in that respect?

A. I remember it was one sample that I said it might be called prime. But this was in June; you was judging, making your examination in June on a 1912 hop; while the grading in November or October would be different on the same hop.

(Testimony of Frank S. Johnson.)

RE-CROSS EXAMINATION

Q. Has mold any injurious effect on the quality of a hop, Mr. Johnson?

A. Well, we find it is hard to sell with mold in. There is complaint from the East; that is what we have got to go by. If a dealer in the East finds mold in the hops he makes a complaint about it.

Q. It affects the market value, does it not?

A. Yes.

Q. Now, would there be any difference between examining a hop for defects in June than there would be in November? That is, if you were examining them for mold, or for unevenness in color, or for any other defect that the hop might contain, would there be any difference in June that there would be in November in examining the hop for that purpose?

A. Well, if the defect was in the way of slackish and moldy, of course next June that would be dried out, so that they would go through better then, and the grading would not be as high and strict then; and they will take hops that has even a little bit more mold in them in June than they would in October—that is our trade in the East.

RE-DIRECT EXAMINATION

Q. Now, Mr. Johnson, I understand from you that by the lapse of time from November, 1912, over to June, 1913, has tested the question whether the mold or slack-dried would be an injury to that hop.

A. Well, it would be an injury to all hops in a

(Testimony of Frank S. Johnson.)

way. Of course, the older they get—but they are still 1912 hops; you can't get around that.

Q. Sure. What I mean is this: Now, if some of these hops were slack-dried, or apparently so, in October, 1912, and objection was made to them at that time—but they were re-examined in June, 1913, and found to be in good condition, then they would pass inspection, would they not, because the supposed injury of slack-dried had disappeared?

A. All the danger of the bale heating would be over by that time. Of course, in October—if there is slackish you run a chance even up till January sometimes that a bale may heat and then turn black.

RE-CROSS EXAMINATION

Q. There would not be any difference, would there, Mr. Johnson, in examining a hop in the court room, than there is in your sample room, if the light is the same?

A. Oh, if we had—we are all used to overhead light, of course.

Q. So that you can examine them better in your sample room than you can in the court room?

A. Yes, sir.

Excused.

Bert Pilkington, called as a witness on behalf of the defendants, being duly sworn, testified in substance:

He is a resident of Corvallis, Oregon; lived there about six years; occupation a chemist; chemist in the

(Testimony of Bert Pilkington.)

State Agricultural College, and employed by the college. Have connection with the Federal Government in a way, for instance I am working, or I am paid directly from a fund that is set aside by the Federal Government to be expended by the Agricultural College. Obtained my knowledge and experience as a chemist at the college and am a graduate of that school; been engaged as a chemist since 1905.

Q. What particular class of work were you doing in 1913?

A. Well, in 1913 I was still working on some hop work that we had begun about 1910.

Q. Please explain the character of that work.

A. Well, it was rather varied. It covered a large scope of the hop work.

Q. Just the general features of it.

A. Well, for instance, one of the particular features of it was a revision of the methods for chemical examination of hops. And I might say, by way of explanation on that, we gathered together all the methods that were obtainable at that time, and compared those, and from that we worked out a method of our own. That is, simply worked over some of these other methods. While we didn't claim originality for a large part of that, there were one or two changes that we did make ourselves in them.

Q. What was the final object in obtaining this process of chemical analysis?

A. The thing that led up to that was the varia-

(Testimony of Bert Pilkington.)

tion, or so-called variation, in the examination or the commercial judging of hops. And the attempt at that time—it was taken up as an Adams project, under the Adams fund, by the Federal Government—to see if they could arrive at some definite method for examining hops, whereby hops would be given examination according to their worth. By that I mean that, in grading of hops by the commercial grading, if the judge knows as to where that hop is grown he can give it a different grading or the commercial value is different than if it comes from some place that has not grown many hops, for instance; that is, it is not strong in the hop industry.

Q. You are acquainted with Mr. John Edmunson, the defendant in this case, are you?

A. Yes, sir, I am.

Q. How long have you known him?

A. I first met Mr. Edmunson, I think, about 1905.

Q. Did you examine some samples of hops that he sent you in 1913?

A. Yes, sir, I did.

Q. About what time in the year was that?

A. That was somewhere between the first and the 10th of June, if I remember right. I don't remember the exact date.

Q. Now, did you make a chemical analysis of those hops to ascertain the amount of brewing quality in them?

(Testimony of Bert Pilkington.)

A. Well, the chemical analysis shows the resin quantity.

MR. WILLIAMS:—Just a moment. We object to the witness testifying further in regard to what that analysis showed, your Honor.

COURT:—You can answer whether you made such analysis.

A. We did.

MR. WILLIAMS:—We desire to make the objection to this witness' testimony along that line for the reason that it is incompetent, irrelevant and immaterial, and an attempt to impose in this case a standard different from that of the hop men themselves.

COURT:—There has been testimony here, coming from the witnesses produced by the plaintiff, touching the amount of resin, or pollen, as it has been described, or lupulin that is contained in these hops, some saying that it had more and some less; and that seems to be the prime quality of the hop. If this witness is competent to testify concerning the quantity of that lupulin in the hops, or the specimens that he examined, I think that would be proper to go to this jury. You may proceed.

MR. BEAN:—We save an exception.

Q. Now, Professor Pilkington, you said you made a chemical analysis of these hops?

A. That Mr. Edmunson furnished me?

Q. Yes.

(Testimony of Bert Pilkington.)

A. I did.

Q. And according to the scientific method used for that purpose?

A. Yes, sir.

Q. Now, what percentage of resin did you find in these hops?

Objected to as incompetent, irrelevant and immaterial.

COURT:—I think I will hear that. The objection will be overruled.

MR. WILLIAMS:—We desire an exception, your Honor.

COURT:—Very well.

A. Why, the sample Mr. Edmunson handed me had 18.15 per cent total resin, and of that total resin there was 16.24 what is known as soft resins.

COURT:—What?

A. Soft resin. You might say there were three resins in the hop.

Q. What was the third resin?

A. That is what they call a hard or worthless resin. That amounts to the difference between the total resin and the soft resin; three resins comprising the makeup of that part of the hop.

COURT:—What is that difference?

A. The difference is about 1.9 per cent—.92, something like that.

Q. You may state now, if you know, what relationship the resin has to what is usually called lupulin

(Testimony of Bert Pilkington.)

in the hop.

A. Well, they have what they call a lupulin granule, and the resin is contained in the lupuline granule, so that if there is no lupulin there, you haven't any chance for resin.

Q. Now, at the time you made this examination, had you made any extensive analysis of hops in the manner that you examined this particular sample?

A. Yes, sir. For instance, all the—

COURT:—Just confine your answers to the question.

A. All right.

Q. Did you ever make any examination of this kind of hops that are pronounced by experts as choice hops?

Objected to as incompetent, irrelevant and immaterial.

COURT:—Do you know what a choice hop is, in your experience; that is, choice hop measured by the commercial rule?

A. No, sir, I do not.

COURT:—You do not?

A. No, sir.

MR. SLATER:—Your Honor, I want to show that the percentage of resin found in this particular sample of hops—its relation to the percentage found in the hops of different qualities that he examined.

COURT:—Well, unless he knows the percentage that exists in the commercial hop of the different

(Testimony of Bert Pilkington.)

qualities, it doesn't seem that he would be competent to testify. If you can show by this witness that he is acquainted with commercial hops, and the amount of resin, for instance, in a prime hop, or a choice hop, or a medium hop, then his testimony would be competent on that point.

Q. I will ask you, Professor, if you made chemical analysis, at the time you examined this particular sample or prior thereto, of samples of commercial hops, to ascertain the amount of resins therein?

A. Yes, sir.

Q. And how many different qualities or kinds of hops did you examine in that way—commercial hops?

MR. WILLIAMS:—Objected to as incompetent, irrelevant and immaterial. The witness shows that he doesn't know what the different qualities, the different grades of hops are.

COURT:—He says he made examination. We will see how that develops a little further. I will overrule the objection for the present.

MR. WILLIAMS:—We desire an exception.

Q. Now, where did you get these various samples from that you examined in this way?

A. They were sent in from different hop dealers.

Q. In this state?

A. Yes, sir.

Q. Name some of them.

A. T. A. Livesley, in fact, furnished us most of

(Testimony of Bert Pilkington.)

our samples; and Mr. Seavey, at Eugene, furnished part of the samples; Mr. McLaughlin, at Independence, furnished us with some samples. And then outside of that, of the locally grown hops, we examined hops from Washington state, from Mr. Horst, of California, Wisconsin hop; New York hop; English hop; and the Salz hop, or the German hop.

Q. You understand that those were hops that were used in commercial business?

A. Some of the hops contained a grading with them.

MR. WILLIAMS:—I move to strike that out.

Q. I don't want that. I want to know if these hops came from a source that you can testify that they represented commercial hop?

A. Yes, sir, they had been cut out of a bale.

Q. Well, I will have to make a leading question. Did you ever receive any samples from brewers in this state of hops for examination?

A. No, not from the brewery. By the way, I won't say whether it is from Pabst brewing people that we got the Wisconsin hops, or just the persons named. I don't recall.

Q. You don't remember of receiving any samples from brewers of this state?

A. No, not from this state, no.

Q. How many different samples of this kind, that you received from the dealers in this state, have you examined?

(Testimony of Bert Pilkington.)

Objected to as incompetent, irrelevant and immaterial.

COURT:—I will overrule that objection for the present.

MR. WILLIAMS:—Allow us an exception.

COURT:—You may have an exception.

Q. Now, what different qualities of hops were these samples that you received, represented to you to be, by those who gave them to you?

MR. WILLIAMS:—Objected to as incompetent, irrelevant and immaterial; matter of hearsay. The witness was not competent to judge.

Objection overruled. Exception allowed.

A. Do you mean by that the grading?

Q. Yes; what quality of hops were they claimed or styled to be?

MR. WILLIAMS:—I desire to renew our objection, your Honor.

Objection overruled. Exception allowed.

MR. SLATER:—That will be understood.

A. Why, some of them were graded fancy, some choice, some prime, some medium. I don't think we had a sample marked "poor" in the entire lot.

COURT:—Do you know what a choice hop is in the market?

A. I couldn't go out in the market and pick up a choice hop, just by going around and feeling of it, or looking at it.

COURT:—Do you know the amount of resin

(Testimony of Bert Pilkington.)

there should be in a choice hop, as sold in the market?

A. That would depend on who judge the hop.

COURT:—That would depend on what?

A. That would depend on who graded the hop, whether it was a choice hop, or prime hop, or medium hop. That was what this work was for. I might say in explanation, what this work was for was to compare these different gradings by different judges.

COURT:—Then there is no uniformity in grading?

A. Not according to these different judges; they don't agree.

MR. WILLIAMS:—That is the very vice, your Honor.

COURT:—That is the kernel of the cocoanut in this case, it seems to me, the very thing we are trying to get at now. Do you know generally what a choice hop is in the market?

A. Well, now, by that question do you mean simply the amount of resin that that might contain, or just the general appearance?

COURT:—No; what would be considered by commercial judges a choice hop in the market?

A. Well, nothing only by comparison, looking at every grading.

COURT:—You have got to take those as to whether it is choice or not choice?

(Testimony of Bert Pilkington.)

A. How is that?

COURT:—Now, if you know what a choice hop is in the market, why, then you can measure your chemical analysis of your resin in the hops you have examined with choice hops. Otherwise, I don't see that we can get a correct estimate in this case upon this particular question.

MR. SLATER:—Your Honor, I think his testimony may be relevant to show the percentage of resin in this particular hop as compared with other samples of hops known in the market as choice, medium and prime, the percentage that might be in them. It is true this witness might not be competent to testify that he can pick out a choice hop.

COURT:—He says he doesn't know, of his own knowledge, what a choice hop is; nor a prime, nor medium. He says what knowledge he has comes from samples of hops that have been sent to him, which have been represented to be so and so. Then he says the judges themselves don't agree upon what is a choice hop, and the amount of resin that should be contained in a choice hop. That is the trouble in making the comparison here.

MR. SLATER:—Well, your Honor, in order to make the record then, we desire to show by this witness that this witness made chemical analyses of a large number of different grades of hops, and that the averages run from 13.49 per cent; and that the minimum percentage for the year in which he made

(Testimony of Bert Pilkington.)

the examination in question was 15.54 per cent; the maximum was 20.49 per cent, and the average 18.06 per cent. That is the testimony that we offer to show by this witness.

COURT:—You don't know, of your own knowledge, about the samples, whether they were choice or prime or medium as to quality?

A. No. We didn't care for that on this other work we were undertaking. We asked—if I may make an explanation there—

COURT:—Yes.

A. We asked that these judges, or asked Mr. Livesley, to send us in a sample of hops judged by different judges, and then we wanted to analyze those hops, and see how those judges agreed. Now, that was the object of that piece of work that we undertook at that time. Now, those hops were graded according to the terms on the hop market.

COURT:—You were inquiring only as to one quality, and that was the quality of the amount of lupulin?

A. No, I might say this—well, that was the standard by which we were measuring; that is, the resin—to see if the resin in a choice hop graded by Judge No. 1 would agree with Judge No. 2, or whether medium graded by one judge, a hop graded by one judge as medium would have the maximum amount of resin equal to a choice hop graded by another judge; to see if a medium fell in a definite class—if

(Testimony of Bert Pilkington.)

their judgment compared as to the amount of resin it contained.

COURT:—I don't think that that elucidates anything in this case particularly. I will sustain the objection, and you may have your exception.

MR. SLATER:—Very well. There is one other question I will put to the witness.

Q. Did you make an analysis of the samples sent you as to the cleanliness of picking?

A. By Mr. Edmunson?

Q. Yes?

A. Yes, sir, I did.

Q. You may state what that was?

A. Well, that was 3.62 per cent of leaves and stems.

COURT:—Out of 100?

A. That had that percentage of leaves and stems in the sample.

Q. Now, how did that average compare with other percentages of other samples that you examined?

MR. WILLIAMS:—Objected to as incompetent, irrelevant and immatreal. That doesn't show whether they were cleanly picked or dirtily picked.

COURT:—I think I will hear that.

MR. WILLIAMS:—The average of the other samples—it is not shown here that those other samples were cleanly picked, or what is cleanly picking; what the percentage of cleanly picking would be.

(Testimony of Bert Pilkington.)

COURT:—It is not very specific, but I will hear that testimony.

MR. WILLIAMS:—We desire an exception, your Honor.

COURT:—Very well.

A. Why, as I said, this sample contained 3.62 per cent of leaves and stems; and they run all the way—some samples I have examined have had less than that, while some have had as much as—oh, about six times as much.

COURT:—Do you know whether those samples with six times as much were of the commercial commodity?

A. Well, I might say that all these hops that we were gathering were supposed to be commercial hops.

COURT:—Supposed to be? You don't know?

A. No. All we had to do was take the other person's word for it that sent us these samples.

Excused.

COURT:—Is Mr. Pilkington here?

MR. SLATER:—He was out in the hall a moment ago.

COURT:—I think I will take his testimony in regard to the amount of resin in the samples. After thinking that matter over, I think it would be a better ruling to let that go to the jury.

MR. WILLIAMS:—We will take an exception, if your Honor please.

(Testimony of Bert Pilkington.)

COURT:—You may have your exception.

BERT PILKINGTON.—Resumes the stand.
Direct examination continued.

COURT:—I have concluded that you might answer as to the amount of resin you found in these different samples. I think the manner in which you obtained the samples has been sufficiently explained heretofore. You may have your objection, and your exception to the Court's ruling.

A. Well, I cannot give the percentage offhand of the amount of resins in each hop separately.

Q. Have you any memorandum, or publication issued by yourself, that contains the data that you made?

A. Why, I think that Mr. Edmunson has such a publication. I have none with me.

COURT:—Well, you may refresh your memory then.

Q. I hand this pamphlet to you. State who prepared the data that is contained therein.

A. Why, this is merely a publication of a record of the work that I did at the Agricultural Station.

Q. Did you prepare the material?

COURT:—I think you better confine yourself to these samples that he said he got from the different parties, to which he testifies heretofore.

MR. SLATER:—That is what I intended to do, but I just want to use what material he has there

(Testimony of Bert Pilkington.)

to refresh his memory. I want to make proof of the genuineness of the memoranda is all.

Q. Now, did you prepare the data that is published therein?

A. I did, yes, sir.

Q. And you know that it is accurate?

A. Yes, sir.

Q. Now, you may refresh your memory by referring to that to ascertain the amount, the percentages in these different samples of hops that you made an analysis of.

A. Of those that were marked by those judges that were sent in? Is that the understanding?

Q. I think so, yes.

COURT:—Yes, it must be that. You understand you are to confine yourself to the samples you have testified to heretofore that were sent to you.

A. That is what I have, yes, sir. I might say that there are nineteen samples here, and to start in to memorize those things or say that I can repeat it off with the gradings, I cannot do that offhand.

COURT:—You may refer to the memorandum.

A. All right. I am allowed to read the classification of these hops that is given here by the judge that sent it in?

COURT:—Let me see what it is. Read from it.

A. The hops are classed here in the different grades. For instance, a note at the bottom here says: "The terms used in the commercial grading rank in

(Testimony of Bert Pilkington.)

the following order: Fancy, strictly choice, choice, strictly prime, prime, good medium, medium, and poor."

COURT:—Well, now, who are the judges?

A. I don't know who the judges were. Mr. Livesley furnished these samples. The pamphlet there states how those samples were procured and the object of getting those. These samples were numbered, and the grade was put with that number in the letter sent to us, and the samples forwarded at the same time.

Q. Is Mr. Livesley a regular dealer in hops? in this state?

A. Yes.

Q. An extensive dealer?

A. He was at that time, yes. There is the table which I referred to.

COURT:—Prime, according to this table, would vary all the way from 15.95 per cent to 20.19 per cent total resin?

A. Yes, sir; and varies in the grading there. The grading is put opposite each sample, and then the judges is on the side margin.

COURT:—Well, you can read from that as to the prime and medium. There is no choice. Yes, there are two choice here.

Have you examined this table, Mr. Williams?

MR. WILLIAMS:—I have not, your Honor.

COURT:—Look at it.

(Testimony of Bert Pilkington.)

MR. SLATER:—I would like to ask the witness another question.

COURT:—Very well.

Q. Do I understand you that Mr. Livesley furnished all these samples?

A. Those samples that are given there? No, Mr. Livesley did not furnish all the samples. Mr. Seavey furnished part of the samples. If I remember right, the larger number of the samples were received from Mr. Livesley.

MR. WILLIAMS:—We are of the opinion, your Honor, that the information there, that could be elicited from the witness.

COURT:—I think you may give the names of gradings according to the samples sent you, the judging of those samples. Just give the general range. Take the prime, for instance. Take the choice, for instance, and then prime, and indicate it.

A. All right. One sample of choice hops by Judge No. 1, 1911 crop, contained 19.42 per cent total resin; and the other sample of choice hops, by Judge No. 2, 1911, contained 19.46; and the other sample of choice hops, by Judge No. 3, 1911, contained 19.98 per cent total resin.

COURT:—Now, give the prime.

A. Prime, 1911, by Judge No. 1, contained 17.23; next prime, by Judge No. 1, 1911, contained 18.83 per cent; and the next prime, by Judge No. 3, crop 1911, contained 20.49 per cent; and the next prime, Judge

(Testimony of Bert Pilkington.)

No. 3, 1911 crop, contained 20.19 per cent; the next prime, 1911 crop, Judge No. 3, 19.42 per cent.

COURT:—What was that that contains 15 per cent?

A. I haven't come to that one yet. I will get that in just a minute. No. 2 Judge, 1911 crop, prime 19.04 per cent. Now, prime, 1910 crop, by Judge No. 1, 15.95 per cent total resin.

COURT:—So the prime varies all the way from 15.95 to about 20 per cent.

A. To about 20½.

COURT:—Well, now, give the medium.

A. Medium—we have only two mediums. They are both 1910 crop. One is 17.21 per cent, by Judge No. 1. Another one is 13.46 per cent, by Judge No. 1.

COURT:—I think that is sufficient.

CROSS EXAMINATION

Questions by Mr. Williams.

Q. You don't know anything about whether or not these were properly graded as choice and prime, did you?

A. Which, these samples here?

Q. Yes, of your own knowledge?

A. Nothing only that the judges sent these in marked so and so, from Mr. Livesley, marked samples marked so and so.

Q. That is all you know about it?

A. Yes, that is all I know about it.

Q. You didn't testify about the other samples,

(Testimony of Bert Pilkington.)

that John Edmunson sent you?

A. How is that?

Q. You didn't testify as to the amount of resin in the other sample John Edmunson sent you?

A. The second sample?

Q. Yes.

A. I did at the other trial, if I remember right.

Q. How much was there in that?

A. There was seventeen and some, if I remember, seventeen and some hundredths per cent total resin.

Q. Those samples that you examined there were from the crop mostly of 1911, were they?

A. I think the larger number of them were for 1911.

Q. And some from 1910?

A. Some from 1910.

Q. None of them from 1912?

A. I think there's some 1912 in there.

Q. Well, do you know it?

A. Well, I can tell by looking.

Q. Well, look and see.

A. No, there is no 1912 sample in here. No 1912 sample in this lot.

RE-DIRECT EXAMINATION

Q. You referred to a second sample that you analyzed for Mr. Edmunson. Do you know how long that sample had been drawn and the condition of it?

(Testimony of Bert Pilkington.)

A. Well, he told me that was a shipping sample.

Q. I don't want what he told you, but did you see any difference in the two samples as to moisture, and the way it had been preserved?

A. The analysis showed that there was a difference in moisture.

Q. What difference was that?

A. There was six per cent moisture in that second sample, or what we termed the dry sample that Mr. Edmunson furnished.

Q. That was known as the dry sample?

A. That was known as the dry sample.

Q. How much moisture was in the other?

A. Seven and one-half.

Q. Well, would the analysis show any deterioration on account of the time that the sample had been exposed to the air, or after it had been drawn?

COURT:—I didn't intend to open up this case again.

MR. SLATER:—Counsel has injected some reference to another sample that we didn't offer. He may have to explain that.

COURT:—Very well.

A. Well, the condition of the sample was noticeably different from the other sample; much drier. It didn't appear to have the life to it that the first sample did have.

Q. Well, but can you state from your scientific knowledge as to how rapidly a hop deteriorates from

(Testimony of Bert Pilkington.)

age and from being exposed to the air after being taken out of the bale?

A. Not the exact amount. But I can state the fact they do deteriorate.

Q. State generally as to how rapidly they deteriorate?

A. In explanation of that, I will say that in the beginning of the work we analyzed a sample there, and left it lying around the room two years. That sample had deteriorated 25 per cent in the total percentage of soft resin at that time.

COURT:—He is not asking about resin. He is asking about moisture.

A. I didn't understand, your Honor.

MR. SLATER:—Yes, that is what I was asking, that is, the resin.

MR. WILLIAMS:—To save the question, we move to strike out all the testimony of this witness, as being incompetent, irrelevant and immaterial, and assuming that a hop that contains eighteen per cent and a fraction, whatever it is, is a choice hop, or a hop that is of a first quality under this contract.

COURT:—The motion will be overruled. You may have your exception.

JUROR:—Can we have the first percentage once more, of the sample of Mr. Edmunson?

COURT:—Very well, you may give that, Mr. Pilkington.

A. The first sample offered in evidence this

(Testimony of Bert Pilkington.)

morning?

JUROR:—Yes.

A. Eighteen and fifteen hundredths per cent.

Henry L. Edmunson, being called as a witness on behalf of defendants, being duly sworn, testified in substance:

I am a brother of the defendant; live in the neighborhood of his farm in Lane County; was there in 1912; live about a quarter of a mile from him; the difference between our farms; am engaged in the business of raising hops; have been for about 20 years; was on the defendant's place during 1912 while his hops was growing frequently, probably on an average of every 10 or 12 days, something like that; observed the manner he cultivated and harvested his crop that year, it was handled in a careful and husbandlike manner like a good farmer would do; it was plowed and cultivated, trained and sprayed properly. He sprayed about the last of July. He handled the hops in the usual way when drying and picking them; they were picked in a careful manner and dried good—dried proper. Was present when a conversation was had about the 12th of March, between my brother, the defendant, and Mr. Wood, who inspected the hops and took them in. He said, with reference to the quality of these hops, about 20,000 pounds should have went on the contract. Mr. Wood said that.

(Testimony of Henry L. Edmunson.)

CROSS EXAMINATION

Witness continued in substance:

I have a hop yard of my own, and cultivated it in 1912, attended to the cultivation of my own yard and the picking and drying of the hops. I didn't pick my hops until after John was through, I used his pickers. I was in his yard a good deal of the time while he was picking his hops, just looking around every two or three days. I hadn't anything particular to do at that time. The picking didn't look dirty to me. I was just looking around, like any observer would going around interested in that line of business. I was in the hop house while he was drying probably three, four or five times, somewhere along there, don't just remember. Observed particularly how the hops were dried. I observed probably eight or ten kilns, something like that. There were always from six to seven or eight bales in a kiln. Was in the hop house when he first commenced picking, after the first day or two until he finished up—all through that time. They dried probably eight or ten floors; I saw the hops on the floor that would make probably 100 bales. He had three floors, three kilns. Examined them practically every time I would go there, and would be there maybe an hour sometimes. It took from 15 to 18 hours to dry a kiln.

Frank Heyer, being called as a witness on behalf of defendants, being duly sworn, testified in substance:

(Testimony of Frank Heyer.)

My business is buyer of hops; been in that business about 15 or 18 years; was employed in 1913 by Harry L. Hart; was at the warehouse where the Edmunson hops were stored at the time they were inspected by Mr. Hart; heard a conversation between Mr. Wood and Mr. Edmunson; heard him (referring to Mr. Wood) say that some of them run pretty nice.

Q. Well, at that time, did you hear Mr. Wood say to Mr. Edmunson that there were 20,000 pounds or over of the hops that ought to have been taken on the contract?

A. Well, now, I don't know. It seems to me like there was something said to that effect, but I could not say for certain; but there was something said similar to it, don't remember the exact words.

The hops were shipped to London. I have had considerable experience in judging hops, taken in a good many thousand bales; examined the hops at that time, looked at them.

Q. Now, you may state to the jury what, in your opinion, was the quality of these hops?

A. Well, now, Mr. Wood, he was the main man, and he said there was at least twenty—

Q. We want your judgment, not what Mr. Wood said about it.

A. My judgment—I considered there was 20 to 25 thousand pounds good prime hops. Some of them were even better than prime.

(Testimony of Frank Heyer.)

Q. What is the quality above prime?

A. Prime would be prime to choice, and then choice.

Q. Do you think as much as 25,000 pounds of that was that class?

A. Between twenty and twenty-five thousand, yes, sir.

Q. What grade would you put on the others?

A. Well, the others was graded as medium.

Q. Do you know how these hops were shipped?

A. Well, I noticed we marked them all up there together—ordered a couple of cars, I think. I was there when we loaded one car. I would not say for certain. I think the cars was both there, yes, sir; loaded them right there.

Q. Do you know whether, about whether they were shipped as one lot?

A. I think they were.

CROSS EXAMINATION

Witness testified in substance:

Went out to examine the hops, Mr. Wood and I went out together. We just naturally inspected the hops. I helped right along, carried out all the tryings, and took out the samples and was right there, seen every bale. Did not grade them myself, I helped. I looked at them, Ross, Mr. Wood, different times wanted to know what I thought of them. I arrived at the conclusion that there were twenty to twenty-five thousand pounds of prime hops, because I in-

(Testimony of Frank Heyer.)

spected the hops; helped inspect them; arrived at the quantity because we weighed them.

Q. Now, isn't it a fact that there were 80 bales there of the best grade of that year's crop?

A. There was something over 100 bales—I could not say now. I think there was either 105 or 110 bales. I could not just remember exactly now, but there was something over 100 bales.

Q. Mr. Wood and Mr. Irwin testified, both of them, that there were 103 they put in the first, better grade.

A. Well, I would not say.

Q. That there was a little over 19,000—between 19,000 and 20,000 pounds.

A. Then there is a difference of opinion, you see. I consider there was twenty to twenty-five thousand pounds at least.

Q. I wanted to get how you arrived at that conclusion.

A. The reason why was because there was some of them I didn't think had anywhere near as much mold in as Mr. Wood thought, see?

Q. They had mold in them, then?

A. Yes, sir; that latter part of them, yes.

Q. Well, now, how about the first part?

A. Well, there was not enough mold in it to speak of—just what we would call a sprinkling of mold in it.

Q. How did the mold get there, Frank?

(Testimony of Frank Heyer.)

A. Well, that is sometimes caused by lice; sometimes it is caused by fog and sultry mornings. It is not caused altogether by lice, because lots of times we have mold in the yards when there is sultry mornings; and fogs cause mold to to the hops, especially when they begin to get ripe towards the latter end of the picking.

Q. Now, you were not grading these hops for Mr. Hart, were you?

A. Ross Wood and I, yes, sir.

Q. They were taking Mr. Wood's judgment on them, were they not?

A. I suppose they might.

Q. Isn't it a fact that you have been buying considerable for Mr. Hart from time to time?

A. Yes, sir.

Q. And that they never allowed you to judge of the hops alone?

A. Yes, sir, I have taken in hops for Mr. Hart alone. And I am buying now for Mr. Livesley, and I am taking in hops; yes, sir; he takes my inspection.

Q. I want you to answer my question.

A. Yes, sir.

Q. Did Mr. Hart ever permit you to make the grading on any lot of hops by yourself?

A. Well, he generally—as to the grading, yes; and he tells me—if I don't agree with him on grading, why, then, of course, it is up to him to decide, of course; certainly; because he is the man I am work-

(Testimony of Frank Heyer.)

ing for. If he would not accept my grading, he would soon let me know.

Q. How many bales were there that you say were prime hops?

A. Prime hops. I would judge there was 130 to 135 bales.

Q. One hundred and thirty?

A. One hundred and thirty to 135 bales, yes.

Q. You didn't make any count of them, did you?

A. Well, pretty close. I kept pretty close watch.

Q. How did you keep close watch?

A. By inspecting them.

Q. Did you put down the number and count them as you went along?

A. No, sir.

Q. Were there any prime hops went into the second car?

A. In the second car?

Q. Yes.

A. Well, now, I would not say, because, as I say. I was not there when they loaded them.

Q. Well, then, you were not there all the time when they inspected them to load them?

A. Well, we don't stay there till the last bale is put in the car. Lots of times we ain't there at all. That is the warehouse man's duty, to load the hops. All we do is to inspect them and weigh them up and mark them. That is all we have to do with it. The warehouse man attends to the rest of it.

(Testimony of Frank Heyer.)

Q. Well, now, as soon as you got through with the first car, were they loaded?

A. No, I don't think so.

Q. When did you inspect them with reference to the time of loading the cars?

A. The time. Well, as I told you before, I don't know exactly whether they was shipped out the same day we inspected them. I could not swear to that. But I know the cars was there.

Q. Wasn't the first car being loaded while you were inspecting them?

A. That might have been. I won't say, because—I know the cars was there, but I could not say; it has been so long ago. I don't remember those things.

Q. You don't have very much of a clear recollection about it?

A. Well, I don't put those things down, no. But I remember the cars being there.

Q. Well, was there more than one carload of what you call prime hops?

A. There was not anything said—I didn't pay any attention to the bill of lading.

Q. How many bales were free from mold?

A. Well, I would judge there was 130, or 135.

Q. Free from mold?

A. Well, not exactly. As I told you, there was some of them had a sprinkling of mold. But there is lots of the hops that have a very little sprinkling of mold. It is not hardly mentioned.

(Testimony of Frank Heyer.)

Q. Then there was mold that run through all of the hops?

A. Very little of it; very little of it.

Q. What do you mean by a sprinkling of mold?

A. Well, that is just where now and then you see a burr that is just affected the least bit by mold. You can just merely see it. It leaves little dark spots in the petal or inside of the burr.

Q. How many burrs in each bale did you inspect?

A. Well, I didn't count them. That would be a pretty hard job, you know—count every burr.

Q. How long were you inspecting them?

A. We was there, I would judge, nearly all day. I didn't put down the time. I judge it would take us—I think it was 250 some odd bales—nearly that time.

Q. Did you test the hops any by chewing them?

A. No; no, they are too bitter for that.

Q. Too bitter?

A. Yes.

Q. Did you test them any by smelling them?

A. Yes.

Q. All of them?

A. Well, I would not say every bale, but nearly all of them. Yes, because I took every—if I remember, I don't think there is anybody else took a handful of tryings out there. And the man that takes the tryings out—as a rule if he is interested in hops

(Testimony of Frank Heyer.)

he is very apt to smell of them, see how they smell, see?

Q. Weren't some of them stewed, Frank?

A. No. There was nothing said about stewed hops.

Q. What is that?

A. We didn't find any stewed hops, nor we didn't find any slack hops.

Q. Didn't you find any slack hops that had been rebaled, some 25 or 30 bales?

A. I think there was 16 bales that John rebaled, but they were not slack. They were redried and baled, see; but they were not slack after he baled them.

Q. Did you ever raise any hops yourself, Frank?

A. No, sir.

Q. Were you there, Frank, when Mr. Wood and John were discussing the question of price of the hops?

A. Well, I know Mr. Wood and Mr. Edmunson got to talking; I think it was on the lower grade, the latter part of the picking. And I know that Mr. Wood called Mr. Edmunson to one side, and I didn't think it was any of my business what they was talking about, so I didn't hear any of their conversation.

Q. Well, you knew that the price of part of them was to be 14 cents?

A. Yes.

Q. And the balance 10 cents?

(Testimony of Frank Heyer.)

A. Yes. There was somewhere near 20,000 taken in at 14; I remember that.

Q. And the balance were 10 cents?

A. Yes.

Q. Now, how many primes went into the 10 cents?

A. Primes? Pretty close to 20,000.

Q. At 10 cents?

A. At 14 cents.

Q. Oh, well, were there any primes went at 10 cents?

A. Well, there might have been.

Q. You don't know about that?

A. Well, I know—

Q. Were you there when Mr. Wood graded them into the two classes?

A. Yes, sir.

Q. Now, did he put any primes in the second class?

A. Well, he might have.

Q. Well, do you know? You saw him, didn't you?

A. Well, they wouldn't take my grading, because they are doing their own grading, see; like you work for somebody else—you can't do as you please.

Q. Well, you didn't pay so much attention to it?

A. Well, I pay enough attention. But then, you know, what I say doesn't count, see? It is the deal-

(Testimony of Frank Heyer.)

er's word that counts.

RE-DIRECT EXAMINATION

Q. You spoke about a slask hop?

A. Yes, sir.

Q. How many bales were there of those slack hops?

A. I didn't see any slacks.

Q. Did you take any samples out of No. 4 bales marked by Hinkle?

A. Yes, when we inspected them. I didn't know Mr. Hinkle—he had them inspected and I didn't know. He had four different grades according to the number of figures on the bale; and I asked Mr. Edmunson there what that meant, and he said, well, that meant four different grades.

Q. How many bales do you remember were marked No. 4?

A. No, I could not say.

Q. But there were some marked?

A. Yes.

Q. Do you know that those were slack hops?

A. No; they was not slack when we received them.

Q. You got samples out of those slack hops?

A. Yes, we tried every bale.

Q. Now, did you use that as a shipping sample to England?

A. Yes, sir.

(Testimony of Frank Heyer.)

RE-CROSS EXAMINATION

Q. How long have you known John?

A. Mr. Edmunson?

Q. Yes.

A. Oh, I don't know. I have known him, I guess, 15 or 16 years, maybe longer. I could not say now. I have known him, yes, just about that length of time, 15 or 16 years.

Q. You have been pretty close friends with John during that time?

A. No, not particularly, no. I don't know as ever bought his hops only but once—once or twice.

MR. SLATER:—With permission of the Court, I would like to ask one more question.

RE-DIRECT EXAMINATION

Q. Are you the gentleman that made the contract of purchase of these hops with Mr. Edmunson?

A. Yes, I bought them. Mr. Hart told me to try and make a deal with Mr. Edmunson. And I made the deal.

Q. Now, you state to the jury what you agreed to pay Mr. Edmunson for all these hops.

A. I bought them on two different qualities, on two different samples. And Mr. Hart told me that he could give Mr. Edmunson 14 cents for certain samples, and 12 cents for the poorer sample.

RE-CROSS EXAMINATION

Q. Why didn't you pay them 12 cents for the poorer sample, Frank?

(Testimony of Frank Heyer.)

A. I don't know. I could not say that—because either the hops were not right, or else the market might have been off a little.

A. R. ZELLER. Recalled for plaintiff in rebuttal.

DIRECT EXAMINATION

Questions by Mr. Williams.

Mr. Zeller, Mr. Edmunson testified when he was on the stand, that at the time the contract was signed up it was understood between him and you that you were to take prime hops under this contract; that is, hops of the grade of prime. What is the fact about that?

A. It is not true; according to the grade of the contract itself, is the only thing that was ever mentioned.

COURT:—The contract would control in this case; not what the parties said about it.

MR. WILLIAMS:—That is true, your Honor. He got that testimony in before we had an opportunity to object to it. It is not true.

COURT:—Very well.

H. A. Hinkle, being recalled in rebuttal, testified in substance:

Have had possibly fifteen years experience in growing hops. The purpose of spraying hops is kill-in vermin, lice and honey-dew that may appear on the hops. Honey-dew is from the effects of lice. Have given the subject of spraying hops a good deal of at-

(Testimony of H. A. Hinkle in rebuttal.)

tention. The best success that I have had from spraying was from about the 20th of June and from that on according to the appearance of lice, but the best results is the latter part of June and the first of July.

Q. Is there any particular time recognized by hop men, growers of hops, as the best time for spraying?

A. The latter part of June and the first of July. yes, sir.

Q. Well, now, if they are not sprayed until the latter part of July or the first of August, what will be the effect at that time?

A. If the hops were lousy and honey-dew had appeared at that time, spraying would be of very little value, because it would make a tendency to drive the lice into the burr and cause them to decay that much sooner. And it is very poor policy to spray that way.

Q. How many times is it necessary to spray hops in years when lice are on the vines or on the hops?

A. That depends on the appearance or reappearance of lice after they might have been killed. Now, you take, for instance, this year; there was yards that was sprayed as high as three times; and other yards got very good results from one spraying; where they were sprayed early.

Q. What is the recognized material, if there is one, that is used by hop men in spraying?

(Testimony of H. A. Hinkle in rebuttal.)

A. Quassia wood and whaleoil soap is the best. There has been this year, and possibly the year before, where tobacco has been used and another ingredient I am not familiar with.

Q. What is the customary habit of the hop men in spraying, as to the material that they use?

A. Whaleoil soap and quassia wood.

Q. That is generally recognized, is it?

A. As the best, yes, sir.

Q. Now, he testified that you told him that you could not handle those hops at all under any consideration. What is the fact about that?

A. I told him that I would not accept those hops under the contract as that quality of hops; that I could not possibly accept such hops on a contract.

Q. Now, what did you mean by such hops?

A. Inferior quality to what was called for in the contract; such hops as he tendered to me on that day.

Q. He has testified you told him if the hops were prime, you told him you would take them on the contract.

A. I said, if those hops were prime in quality, before we went out to inspect them, that I would take on our contract every bale that run prime, yes, sir. But there was no hops in the lot that was prime.

COURT:—What did you say about rejecting them?

A. I told him that I would have to reject the

(Testimony of H. A. Hinkle in rebuttal.)

hops because they were not of the quality stipulated in our contract.

COURT:—Did you mean by that you would reject the hops absolutely?

A. On the 31st day of October?

COURT:—Yes.

A. Yes, sir.

COURT:—Then did you have in mind the clause in the contract that permitted him to make a tender of the hops if they were not up to quality?

A. Yes, sir.

COURT:—Did you reject them absolutely notwithstanding that clause?

A. Well, he didn't make any tender to me. It is his place to make the tender, and I told him then that I was willing to arbitrate. There is a clause also in the contract that calls for arbitration.

COURT:—That is, arbitrate as to the quality?

A. Difference of opinion as to quality, yes, sir.

Q. Now, he testified that you didn't know what they were; that you told him you didn't know what they were, that they graded them at the office in Portland.

A. He asked me the grading of the samples that he had shipped to Portland. And I told—I didn't know, because I hadn't seen them, and that they had never reported to me what classification those hops were.

Q. You hadn't at that time seen them, then?

(Testimony of H. A. Hinkle in rebuttal.)

A. Not at the time he asked me the question. That was before I had been out there the first time.

Q. Now, did you tell him that you could not grade the hops, that they graded them down here?

A. No, sir, I did not. I want to correct my testimony in one place. He asked me the grading on those hops the first time I was out there, what they was graded in Portland, or what the grading was on them; and I told him at that time that they graded them in Portland.

Q. That is from the first to the third?

A. Yes, sir, first to the third.

Q. Then the conversation that you had with John at that time was simply upon the two samples that you took out?

A. Yes, sir; if he had no hops better than those two samples, that I would have to reject them. And he said he thought he had some better; and it was necessary for an inspection, which I was ready and willing to do.

Q. He testified you advised him to sell to somebody else. Did you do that?

A. Not on the first trip there, I did not; no, sir.

Q. Did you afterwards?

A. I told him that there was only one thing to do; that it would be necessary for him to sell them and to get the best he could out of them.

Q. When was that?

A. It must have been on the 31st day of October,

(Testimony of H. A. Hinkle in rebuttal.)

I guess, if I made any such assertions as that. I don't know that I did; but if I did say so, it was at that time.

Q. Now, John testified that the price of hops dropped immediately after you rejected them the first time; as he put it; between that and the 31st of October, when you made the second inspection, that the price went down and then went up again.

A. I don't remember as to that; possibly might have fluctuated; possibly become a little quiet along in there; but I don't think there was very much of a change, but still there might have been a cent or so variations.

Q. He testified that immediately after the 31st of October the price dropped as low as 10 cents.

A. For what quality?

Q. He didn't say.

A. Well, there might have been a few poor grades in the state bought at 10 cents, very inferior grades—there was no good hops.

Q. How low did the price of choice hops go?

A. I don't think choice hops ever was under 15 to 16 cents; that is, up till some time after these hops were sold.

J. W. Seavey, being called in rebuttal, testified:

Q. Mr. Seavey, what is your business?

A. Hop grower and dealer.

Q. How long have you been in that business?

A. I have been growing hops all my life. I have

(Testimony of J. W. Seavey in rebuttal.)

been dealing about 20 years.

Q. Have you been growing hops any?

A. About 30 years, I guess—as long as I can remember.

Q. To what extent?

A. Started in a small way, but I am now about the largest grower in the state. I think I am the largest individual grower in the state.

Q. How much experience have you had in spraying hops?

A. Well, I guess I have sprayed hops more than any other man in the state.

Q. What is the principal season of the year to commence spraying hops?

A. Well, we figure on spraying before they bloom. Some years they are a little later than others, probably a few days; but we always figure on spraying before the hops begin to bloom; and that is along about the first of July. If you wait later you will ruin the bloom. If they get out in full bloom when you spray you will knock a great many of them off.

Q. Will that have any more effect than just to knock part of them off?

A. Well, if you spray later, after the hop is set on, it tends to affect the hops. It will—I don't know how to express it, but cause them to kind of curl up, and they will be immature. I have ruined one crop by spraying in August. There was part of our crop at Eugene sprayed too late, and they never

(Testimony of J. W. Seavey in rebuttal.)

did amount to anything. They would curl, and green, and it don't do any good to spray hops any-way after they set on. The vermin or lice get into the burrs and you can't reach them with the spray. It is money thrown away after the hops are set on.

Q. What are the principal materials for spraying hops?

A. Well, there is a good many. We have used everything in a small way, but we find quassia chips and whaleoil soap, or fish oil soap, to be the most effective. In fact, the Agricultural College, I think in 1912—we gave them an acre and they used every kind of spray that they could get hold of. And after they had finished, they told us that our spray was much more effective than theirs.

Q. About what time do the buds begin to set on the vines?

A. About the 15th of July. They bloom along about the first of July, and then the 15th, from then on they begin to change from bloom to the burr and small hops begin to set on. By the first of August you find plenty of hops as big as hazel nuts or larger.

Q. The first of August?

A. Yes.

Q. What effect would spraying have the last week in July or first week in August?

A. Well, there is a chance of injuring the crop, and I don't think it would do any good, as far as it might kill a few lice; but there is enough of them in

(Testimony of J. W. Seavey in rebuttal.)

the hops by that time to do the damage anyway; that is, we have found it that way. We have experimented every way; and we find if you can spray from the 20th of June up to the 10th of July it is more effective.

CROSS EXAMINATION

Questions by Mr. Slater.

Q. Well, Mr. Seavey, isn't there quite a difference in appearing of bloom in different yards?

A. You mean high ground or low ground?

Q. Yes.

A. No, I don't think so; not after that time of year.

Q. Or different localities?

A. No, I don't think so.

Q. And difference in time of blooming as to the kind of hops?

A. No. Well, there is a little difference. The red vine hops bloom about a week earlier than the clusters. Red vines are a little later hops, and they bloom a little earlier. They grow slow, and they bloom a little earlier.

Q. In your judgment, you might spray reasonably successfully any time before the burr appears?

A. Yes. I am going to try that next year. We are going to commence spraying the 15th of June next year. We figure spraying later helps to blight; and we are going to try earlier spraying next year on that account.

(Testimony of J. W. Seavey in rebuttal.)

Q. Well, supposing that lice didn't appear until the last week of July or the first of August, what would you do about that?

A. Well, I would not spray.

Q. You would not spray at all?

A. No, sir.

Q. You think that there might be some damage?

A. Well, I don't think it would do any good. We have experimented with it, and we find that it doesn't do any good. We would not spray at all the first of August.

Q. Could you say that any particular damage to the hops would result from spraying at that time?

A. Well, yes. I know in one of our yards in Eugene—I think it was 1912 or 1909, one of the wet years—we sprayed them late, and we never could sell them. They were green and fluffy, curly.

Q. Well, wasn't that a peculiar season on account of excessive moisture?

A. No, I don't think so. The other part of the yard that we sprayed earlier was all right.

Q. Well, now, don't you know, as a matter of fact, a great many hop raisers don't spray until the first of August?

A. No, I don't think so. There might be a few of them; but if they put it off that late they have trouble. And another thing—the lice appear before that time. The lice come in, the first crop—they come in crops—the first crop is a flying lice, and they

(Testimony of J. W. Seavey in rebuttal.)

deposit the small ones on. And they all leave by the first of July. You never can find them after the first of July. And the other lice are always there. Of course, if it comes rainy weather, weather in their favor, they will increase faster. Then the second, which hatches in September, hatches into another family of flying lice. I think they will commence about the 15th of September.

Q. That is about picking time?

A. Yes, along the last of picking time.

Q. How many times did the flying lice appear last year?

A. Twice. They appeared early and in the last of September again. But there is no flying lice could be found. I do that work; I make that a specialty as my part of the work; and I think after June the 15th it is very seldom we find any flying lice; that is, in any quantity.

Q. Didn't the lice come back again along in the latter part of July last year?

A. No, sir; not if they are sprayed.

COURT:—That is last year you want to inquire about?

MR. SLATER:—Well, I am just testing his knowledge as an expert. That is all.

RE-DIRECT EXAMINATION

Q. Where are the most of your yards, Jim?

A. Why, I have them all through the state. I have one at Eugene—I have 160 acres there; 135 in

(Testimony of J. W. Seavey in rebuttal.)

Benton county, right near Corvallis; I have 165 acres in Washington county, near Banks. That yard is up on a hill. Last year is the first year we ever sprayed that hill.

Q. You know Mr. Edmunson's yard, do you?

A. Yes, I know where it is located.

Q. Have you ever been in it?

A. Yes, a good many times.

Q. What kind of vines are those?

A. I think most of them are the cluster.

Q. There is one matter there I don't quite understand, Jim. I want to ask you for information about it. Now, the first crop of lice you say that come—

A. Yes.

Q. They deposit eggs on the vines?

A. No, they deposit small lice.

Q. Small lice?

A. Yes.

Q. Then these small lice grow in size; is that it?

A. Yes, sir.

Q. Those are the ones you have got to kill?

A. You kill those off any time from the last of June, oh, up to the first of August or the middle of July—if you get them all well killed, you need not worry; your hops will be taken care of; 1913 I commenced picking hops the 4th of September, and picked continuously till the 4th of October, and had no mold at all. It is in the spraying and the mate

(Testimony of J. W. Seavey in rebuttal.)

rial you spray with, a good deal.

Q. Now, does mold in the hops affect their market value?

A. Yes, sir. There is a great many—most important brewers, the big ones, you can't ship moldy hops to them at all.

MR. SLATER:—I think, your Honor, that is not proper rebuttal.

COURT:—I think you are getting outside of rebuttal.

Q. There is some testimony here about a sprinkling of mold in the hops. Would a sprinkling of mold in the hops affect their commercial value?

A. Well, I don't think so. A sprinkling of mold—we pass them and get through with it. What you mean by a sprinkling of mold—you cannot find a—

COURT:—I think that is part of your case in chief.

MR. SLATER:—We are not objecting, your Honor.

COURT:—The Court is not going to take up time with this. I want to get through with it.

JUROR:—How many times do you spray?

A. Twice.

JUROR:—How close together?

A. About eight days apart.

James Hayes, being called in rebuttal, testified:
Questions by Mr. Williams.

Q. Mr. Edmunson testified when he was on the

(Testimony of James Hayes, in rebuttal.

stand, that Mr. Hinkle called him off to one side under the horse shed there, somewhat mysteriously, to get him off by himself. Did you see anything of that kind?

A. Which time do you refer to?

Q. The first time you were there.

A. No, sir. The last time we was there I went to get the rig; and they walked off towards Edmunson's horse; but the first time we was together.

Ross H. Woods, being called in rebuttal, testified:
Questions by Mr. Williams.

Q. Did Mr. Heyer have anything to do with the grading of these hops?

A. No; just helping in the warehouse is all.

Q. Did he assist you any in grading them?

A. No, he did not; just helped carry the tryings out to the light, is about all; helped to weigh some of them.

Q. Now, at the time that you were talking with Mr. Edmunson there, did you know the terms of the Klaber, Wolf & Netter contract?

A. No, I did not.

Q. Did Mr. Heyer stay there all through the time that you were grading the hops?

A. I don't know that for sure. He was out and in, in the warehouse and out on the platform.

Q. Did he take an active part in inspecting the hops?

A. No, he did not.

(Testimony of Ross H. Woods, in rebuttal.)

Q. Whom was he working for at the time?

A. H. L. Hart.

Q. And working with you?

A. Yes.

Hal V. Bolam, being called in rebuttal, testified:
Questions by Mr. Williams.

Q. Mr. Bolam, have you any information in regard to the way the hop dealers and hop buyers treat a chemical analysis of hops?

A. I never heard of them referring to it at all, Mr. Williams. Hops, as far as my knowledge goes in the business, are never bought or sold by chemical analysis.

MR. SLATER:—I don't think that is material, your Honor.

COURT:—I think I will hear the testimony in view of the testimony of Mr. Pilkington.

Q. Do they ever pay any attention to chemical analysis in buying and selling hops?

A. Not to my knowledge, Mr. Williams. They buy on sample only; sample and inspected in the customary way. That is the way dealers buy from growers and brewers from dealers.

Q. What are the general markets of the world in buying hops and selling them?

A. Well, you mean that buy from dealers here?

Q. Yes. Where are the hops sold?

A. Well, a good many are sold, of course, in the United States.

(Testimony of Hal V. Bolam, in rebuttal.)

Q. What places in the United States?

A. Chicago, New York, Cincinnati, St. Louis, and Milwaukee.

Q. Have you had dealings in all of those markets?

A. No, no direct dealings. Simply I have shipped hops, when I was with Mr. Livesley I have shipped hops to brewers in those centers. I have shipped a great many hops to London, my native town.

Q. In any of those places that you have had connection with or shipped hops to, do they pay any attention to chemical analysis?

A. Not that I know of; certainly not between ourselves and them.

Max Wolf, being called in rebuttal, testified:
Questions by Mr. Williams.

Q. Mr. Wolf, how long have you been in the hop business?

A. Over 35 years.

Q. Where?

A. San Francisco, Portland, Oregon, and Washington.

Q. You have been buying and selling hops all those years?

A. Yes, sir.

Q. Has that been your constant business?

A. Yes, sir.

Q. To what extent have you been dealing an-

(Testimony of Max Wolf, in rebuttal.)

usually in hops?

A. What do you mean, to what extent? More or less extent—quite largely at times.

Q. How many hops, on an average, do you buy annually?

A. Oh, I never figured that, figured it out.

Q. Do you remember how many you bought in the year 1912?

A. I made no—twenty-five or thirty thousand bales, figured in the rough.

Q. Would that be about an average year?

A. Oh, I could not say. I never figured it specially.

Q. You may state whether or not at any time during your business in the hop industry, the persons to whom you have sold hops have ever paid any attention to a chemical analysis of hops.

A. They never demanded anything of that sort from us. You mean the parties to whom I sold?

Q. Yes.

A. Never required it.

Q. Have the brewers ever bought on a chemical analysis?

A. Bought from growers?

Q. Yes.

A. No; not to my knowledge.

Q. What markets have you sold your hops in that you have bought?

A. Markets? To Australia; England; domes-

(Testimony of Max Wolf, in rebuttal.)

tic markets; some to South America, different points.

Wherever there are brewers, our hops have gone.

Q. Sold them in New York?

A. Lots of them.

Q. Chicago?

A. Yes.

Q. All the markets of the United States?

A. Nearly all of the markets, I should say—they have found their way there, the hops we have sold.

Q. Do you know whether or not the brewers have ever been able to determine by chemical analysis the exact principle in hops that make the good beer, or make beer?

A. Whether the brewers have?

Q. Yes.

A. Not to my knowledge. I don't believe they have bothered much about the chemical analysis of hops. They depended on the dealers mainly.

Q. Do you know what the essential element of the hop is that makes the beer?

A. What makes the beer?

Q. Yes.

A. Well, it is the tannin in the hops; the essential oils and the soft resins. They are the principles of the hops in general.

INSTRUCTIONS

Gentlemen of the Jury:

Note One, preliminary explanation omitted.

The plaintiff, Max Wolf, sues individually. The contract was made, however, with the firm of Klaber, Wolf & Netter. The firm was composed of Wolf and Netter, but it took the firm name of Klaber, Wolf & Netter. Since the contract was drawn and some of the dealings were had with reference to an inspection of the hops and a delivery thereof, one of the firm has died, leaving now but one of that firm, namely, Wolf himself, who is suing as the surviving member of the firm.

Evidence has been offered here, by way of a transcript of record of the Probate Court in California, to show that Netter has died, and that since his death the estate has gone so far as that the administrator has assigned to Wolf what interest Netter, or the estate of Netter, had in the firm. But Wolf is now suing as the survivor of the firm, and I will instruct you, gentlemen of the jury, under the testimony in this case and under the pleadings as amended, that Wolf has a standing in court to sue in that right, that is, as the survivor of the firm; and he is suing really in behalf of the firm, and whatever is recovered, if anything at all, would be the funds of the firm, but Wolf would have a right to recover it under this form of complaint.

Now, gentlemen of the jury, the complaint states,

in effect, briefly as I shall give it to you, that on the 29th day of May, 1912, the firm entered into a contract with the defendants, whereby the defendants agreed to produce 30,000 pounds of hops, net weight, of the crop to be grown in the year 1912 by the defendants upon the farm owned by Mrs. Edmunson. It is further alleged that the defendants agreed to cultivate, carefully spray, cleanly pick, properly dry, cure and bale, and prepare for market, all of said hops grown on the said premises, in a good and husbandlike manner; that it is provided in the contract that all of said hops were to be of first quality, that is, sound condition, good and even color, fully matured but not over-ripe, flaky, cleanly picked, properly dried and cured, free from sweepings and other foreign matter, and not affected by spraying or vermin damage, and should not be the product of a first year's planting. It is further alleged that Klaber, Wolf & Netter agreed to pay the defendants at the rate of 25 cents per pound for the hops, when delivered in accordance with the terms of the agreement; that the hops were to be delivered free from all liens or incumbrances of whatever kind and nature, on the cars or in the warehouse at Goshen, Oregon, between October 1, 1912, and October 31, 1912. It is further alleged that it was agreed that Klaber, Wolf & Netter should advance under said contract, as part payment for said hops, the sum of \$1,200.00 on or about May 31, 1912, and \$1,800.00 on or about the first of September, 1912; and it is alleged that

they did so advance the sums named. It is alleged that it was further agreed that, if in the judgment of Klaber, Wolf & Netter the quality of all or any part of the hops tendered under the said contract by said defendants, should be inferior from any cause whatever to the quality of hops specified in said agreement, it should be the duty of defendants to tender to the said Klaber, Wolf & Netter the said hops raised, and the said Klaber, Wolf & Netter might have the right of accepting the entire quantity contracted for, at a reduction in price, which reduction should be equal to the difference between the market value of said hops tendered under the contract and the market value at the time of the execution of the contract. It is further alleged that during the month of October, 1912, the said Klaber, Wolf & Netter received samples from the hops grown upon said premises during the said year 1912, and, finding them of inferior quality and not according to the specifications contained in the said contract, said Klaber, Wolf & Netter, on the 30th day of October, 1912, inspected the hops fully and completely, and found them slack dried, bad and uneven in color, of unsound condition, not fully matured, not cleanly picked, not properly dried or cured, and affected by vermin damage; whereupon the said Klaber, Wolf & Netter rejected said hops as first quality hops as defined by the contract, and said defendants refused to tender the said hops to said Klaber, Wolf & Netter at any reduction in price,

but refused to act any further under the said contract or comply with any of the terms or provisions thereof, and said defendants, without the knowledge or consent of Klaber, Wolf & Netter, proceeded to and did sell the said hops to other parties, in violation of their contract.

(General instructions on preponderance of evidence omitted.)

Now, most of these allegations in this complaint are admitted by the defendants. All of paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the complaint are admitted; so by keeping that in mind, you will have no trouble in determining whether they are proven, because the admission means proof. As to paragraph 10 of the amended complaint, "These defendants deny that during the month of October, 1912, the said Klaber, Wolf & Netter received samples of the hops grown upon said premises during the said year 1912, and finding them of inferior quality or not of the specifications contained in said contract, said Klaber, Wolf & Netter on the 30th day of October, 1912, inspected the hops fully or completely, or found them slack dried, or at all, or uneven in color, or of unsound condition, or not fully matured, or not cleanly picked, or not properly dried or cured, or affected by vermin damage." So that as to paragraph 10, that is in effect denied in whole, and that forms the issue as to that paragraph for you to determine whether the plaintiff is right in the allegations of the complaint, or whether the defendants' denial is

right, and hence that forms the principal grounds for your consideration.

Then it is further alleged, by way of admission, in this wise: "These defendants admit that the said Klaber, Wolf & Netter, through their representative, rejected said hops, and deny that the reason for the same was that they were not first quality hops as defined by that contract, and these defendants deny that they refused to tender the said hops to the said Klaber, Wolf & Netter, at any reduction in price or refused to go any further under the said contract, or to comply with any of the terms and conditions thereof, or that said defendants, without the knowledge or consent of said Klaber, Wolf & Netter, proceeded to and did sell the said hops to other parties in violation of their said contract, or otherwise, except as hereinafter alleged." They allege what they did with the hops thereafter. So that there is a denial that far, and what we term in law an avoidance. After having denied these things, the defendants set up what they did concerning the hops, and in that way it is sought to avoid the effect of the allegations of the complaint. Now, there is affirmative matter set forth in the part of the answer controverts the plaintiff's allegations. I will not read that affirmative matter to you, because it is repeated in a further and separate answer, which I will call to your attention now.

It is alleged on the part of the defendants, as a further and separate answer to this complaint, that

they did enter into the contract as alleged, and they set forth a copy of the contract as "Exhibit A" to the answer, and that copy of the contract will be for your inspection when you retire to the jury room. Then it is alleged that the defendants produced, for the year 1912, 40,000 pounds of hops, all of which were picked, dried and baled according to the terms of the contract, and stored in the warehouse at Goshen on and between the first and 31st days of October, 1912, and that the defendants tendered said hops to said partnership on and between said dates, at said place. And defendants allege that said hops contained more than 30,000 pounds of the quality described in the contract; that the partnership pretended to inspect and examine said hops on or about the 3rd day of October, 1912, but they inspected only two bales thereof, and did not examine any of the rest of said hops in said warehouse, and at that time the said partnership notified the defendants that they had rejected the hops, and would not take them under any condition whatever, and requested the defendants to sell said hops to other parties; and thereupon said partnership, without any right and against the terms of said contract, demanded of the defendants the repayment of the advance made for the cultivation and picking of said hops. Then it is further alleged that the partnership made no further inspection of the hops until about the 31st day of October, 1912, when the partnership, not acting in good faith but merely pretending to inspect said hops,

examined the same, and wrongfully notified the defendants that they rejected all of the hops so grown by the defendants, and notified defendants that they would not take them under any conditions whatsoever, and again demanded of the defendants the repayment of the said advances. Then it is further alleged that the defendants complied with all the terms and conditions of the contract, and that the said purchasers never at any time acted in good faith in the inspection and examination of the hops, but at all times intended to, and did abandon their said contract, for the sole reason that the market price of hops at the time of said tender and inspection was about 16 cents per pound for the quality of hops described in the contract, whereas the contract price agreed to be paid was 25 cents per pound; and the defendants allege that they had enough hops of said crop of the quality required under the contract to fulfill the terms thereof, and that the defendants were at all times ready, able and willing to deliver said hops to said purchasers, and were willing to do so at any time during the life of the contract, if the purchasers had not refused to take said hops, and referring to the allegations in the complaint that the defendants sold the hops and shipped them out of the state of Oregon, defendants allege that the hops were not sold until March, 1913, and were held in said warehouse until that time, without any incumbrance whatsoever except as the said purchasers might have claimed, as they at all times well knew.

Then it is alleged that on the 12th day of March, the defendants were compelled to and did sell the hops at an average price of 12 cents per pound, which was the reasonable market value of said hops in Lane county at that time, and that by reason thereof the defendants suffered a loss amounting to \$3,900.00, all of which was caused on account of the said purchasers not complying with their contract. Now, this sum of \$3,900.00 the defendants ask judgment for; or, in other words, they ask that whatever claim or demand the plaintiff has for the advances made.

(Preliminary instruction as to abatement omitted.)

Now, I will say in this relation that, as to the affirmative matter contained in these further and separate answers, the burden devolves upon the defendants, before they can recover, to establish their allegations in that respect by a preponderance of the evidence, as the plaintiff is required to establish his affirmative allegations by a preponderance of the evidence.

Now, this brings me to the contract, which I will explain to you so that you may understand what is meant by certain clauses thereof. The contract, as I have said, or a copy of it, is attached to the answer and marked "Exhibit A." In this contract the parties, J. M. Edmunson and Mrs. M. J. Edmunson, are described as the buyer, and so the contract treats them as seller and buyer. The contract first sets out

that, for the consideration of one dollar to be paid to the seller by the buyer at the time of the execution of the agreement, and the further covenants and agreements therein contained on the part of the parties to the agreement,—that constitutes the consideration upon which the contract was entered into. Now, as to the sale, the seller has bargained and agreed to sell, and the buyer has bargained and agreed to purchase, 30,000 pounds, net weight, of the crop of hops of the growth of 1912. Then as to the description of the realty, that is set out; that is to say, the contract states where the hops shall be grown, but that is not a material matter in this complaint, because all matters with relation to the place where the hops were grown are admitted, and indeed the matter is admitted that more than 30,000 pounds of hops were grown upon the place. Now, as to the quality:

“The said seller hereby agrees to cultivate, carefully spray, cleanly pick, properly dry, cure and bale and prepare for market all of the said hops grown on the above described property, in a good and husbandlike manner. (The said hops covered by this instrument shall be of first quality, i. e., of sound condition, good and even color, fully matured, but not over-ripe, flaky, cleanly picked, properly dried and cured, and free from sweepings and other foreign matter, and not affected by spraying or vermin damage. Said hops shall not be the product of a first year’s planting.)”

Then there are other conditions in the contract, as to baling and tare, and then we come to the price:

“The said buyer hereby agrees to pay to the said seller at the rate of twenty-five cents per pound for the hops above sold when delivered in accordance with the specific terms of this agreement.”

Then as to advances: The buyer agrees to advance to the seller, as part payment under the contract, upon ten days' request therefor in writing, the following sums—\$1,200.00 on or about May 31, 1912. and \$1,800.00 on or about September 1, 1912, as actually required for picking purposes.

Then as to inspection:

“The said buyer shall have the privilege of inspecting all of the said hops grown by the said seller upon the above described property, either on the farm of the said seller or at any place the said hops may be stored or located, and selecting therefrom the quantity sold under this contract.”

(Explanation as to delivery, interest, inferior quality, omitted.)

(Instruction as to the clause on tender of the hops and insufficient quantity and general explanation. omitted.)

Now, the defendants having admitted that the advances of \$3,000.00 were made under the contract, the plaintiff would be entitled to recover that sum back, unless the defendants have complied with their part of the agreement, in producing 30,000 pounds of hops of the quality stipulated to be produced, and

were at the time stipulated for delivery ready and willing to deliver same to the plaintiff; or, if the hops were not up to the stipulated standard in quality, that is, were not of first quality, then unless defendants made tender of the 30,000 pounds under the "Inferior Quality" clause of the agreement, and still stand ready in either event to make such delivery, unless excused from making delivery now by the act of the plaintiff as set forth in the first of the separate affirmative answers of the defendants.

I will explain to you what is required of the defendants to produce as to quality. It is set out in that clause that the hops covered by the contract shall be first quality. Then it sets out further what is meant by first quality; that is to say, they shall be of sound condition, good and even color, fully matured but not over-ripe, flaky, cleanly picked, properly dried and cured, and free from sweepings and other foreign matter, and not affected by spraying or vermin damage.

Now, gentlemen of the jury, there has been considerable testimony here as to whether these hops were, under this clause of the contract, of first quality. You remember that they have been described in their different qualities as choice, prime and medium. Now, "first quality hops" means simply that the quality shall be substantially as described here, and as has been conditioned as to the quality of hops to be produced. It is not necessary that the defendants show that the hops are of exact quality as here

described, but they must be of substantial quality as herein described. It is almost impossible in the sale of products of the kind—you may take barley and oats, for instance, and if they are sold to be of first quality, it is sufficient if they come up to a substantial condition as described, or as stipulated that the quality shall be. Now, it is said here that they should be of sound condition, good and even color, fully matured, etc. Several conditions are therein set out. Now, all of these must be substantially made out; that is to say, they must be substantially of sound condition, and substantially of good and even color, and fully matured, substantially so, but not over-ripe, and substantially flaky, cleanly picked, etc. So you shall put all of these conditions together, and in the end determine whether or not, considering all, the hops come up substantially to first quality.

As to this, in this connection, I will instruct you “that the contract at issue in this case defines the particular qualities of the hops necessary to constitute hops of first quality, and to determine from the evidence introduced in this case, whether the hops raised and tendered by the defendants are of the prescribed quality, you will consider only the elements named in the contract, namely,—of sound condition, good and even color, fully matured but not over-ripe, flaky, cleanly picked, properly dried and cured and free from sweepings and other foreign matter, and not affected by spraying or vermin damage; and in

considering the evidence adduced pertaining to these qualities, you are not bound to find a strict or literal compliance with these qualities, but if you find from a preponderance of the evidence that the hops so tendered possessed substantially the qualities named in the contract, then you would be authorized to find that the hops complied with the terms of the contract. And I further instruct you that a designation of a particular quality, as good color or sound condition, does not mean that the color shall be the best possible color, or that sound condition means the best possible condition, but such designations mean only that they shall be of a merchantable quality according to the custom of the hop trade, and that the hops in those respects shall be suitable for the purpose for which they were intended; good as to quality does not imply and absolute quality as the best, but that the article shall be good of its kind."

I will state further, in this connection, gentlemen of the jury, that these hops were raised for the market, and the contract was made with the market value in view, and, in considering the quality of these hops, you will consider them as merchantable, as the parties themselves desired that the hops should be sold in the market and should be so treated, so that the merchantable value is the thing you are to consider, and not, strictly speaking, the real inherent or chemical value.

I will instruct you further: "There is testimony

in this case tending to show that hops have a commercial value corresponding to the grade which they occupy, and are bought and sold on that basis. I have used the word 'substantially' in connection with the quality of the hops, that is, that the hops must be substantially of the quality defined in the contract. If the hops contained any of the defects mentioned in the contract so as to reduce the market grade thereof and so as to reduce the market price, then the hops would not be substantially of the quality defined in the contract."

The defendants were required to produce 30,000 pounds of hops. There is no dispute, I might say, as to the quantity produced. It is practically admitted that the defendants produced about 40,000 pounds of hops. But the real issue centers about the quality. In this relation, there is a dispute as to what was done. The defendants claim that the plaintiff, after inspection, declared the hops to be not up to the quality stipulated for, and thereupon rejected the hops absolutely and demanded repayment of the money advanced. If plaintiff did this, he would not be entitled to insist upon the defendants making tender of the hops as inferior in quality in pursuance of what is styled the "Inferior Quality" clause of the agreement, because by his conduct he would have waived performance in that respect upon the part of the defendants.

(Instruction as to tender omitted.)

The defendants, however, claim they had 30,000

pounds of hops ready for delivery of the quality substantially as stipulated for, which claim is disputed, and this makes it incumbent upon you to ascertain whether the hops were in quality up to the contract. If they were, then plaintiff was required to take them, and to pay the balance due at the rate of 25 cents per pound; that is, if there were 30,000 pounds of hops of the stipulated quality. He was not required to take less than that amount. If the defendants tendered less than the quantity of hops contracted for, then it was defendants' duty to tender all the hops raised, if less than the amount contracted for, that is, less than the 30,000 pounds, so that plaintiff would in that event have been entitled to damages as stipulated for under the "Insufficient Quantity" clause. But there is no claim that the contract has been breached in this respect, that is, as to the quantity produced, and you need not give that particular phase of the contract further consideration. At any rate, the plaintiff was not bound to accept less than the stipulated amount of hops agreed to be produced, or hops of a quality inferior to the quality stipulated for; and if the hops produced were either short in quantity or below the stipulated standard in quality, the plaintiff was entitled to reject them, and, if he did so, would be now entitled to recover.

If, however, the hops were up to the stipulation of the contract in quantity and quality, then the plaintiff was required to take them and a refusal

to accept was a breach of the contract on his part. and he would still be liable for the full amount of the purchase price at 25 cents per pound, less the \$3,000 advanced, if the defendants were still in a position to deliver the hops, or have been excused by the act of plaintiff from now making delivery, as they claim that they are excused under the further and separate answer.

This brings us to the defense interposed to plaintiff's complaint, which is that defendants produced hops in quantity and quality in accordance with their agreement; that plaintiff pretended to inspect them, but did not act in good faith, and so acting in bad faith because hops had dropped in the market below the contract price, plaintiff notified defendants that he rejected all such hops, and would not take them under any conditions, and demanded repayment of the money advanced; that defendants had enough hops of said crop of quality required under the contract to fulfill the terms thereof, and were at all times ready, able and willing to deliver them to the purchasers at any time during the life of the contract, if the purchasers had not refused to take them, and that, having held them until about March 12, 1913, they were compelled to and did sell them at an average price of about 12 cents per pound, by reason whereof they suffered a loss of \$3,900.00.

Now, the defendants were not required to hold the hops indefinitely for plaintiff after rejection by plaintiff and notification that he would not take them,

exceptions and order that the same be filed and spread of record in the cause as of the date of the judgment.

Dated July 29, 1916.

CHARLES E. WOLVERTON,
United States District Judge, District of Oregon.

United States
Circuit Court of Appeals

For the Ninth District

MAX WOLF,
Plaintiff in Error,

vs.

J. M. EDMUNSON and M. J. EDMUNSON,
Defendants in Error

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the District Court of the
United States for the District of Oregon.

J. M. WILLIAMS and
LOUIS E. BEAN,
Attorneys for Plaintiff in Error.

Filed

SEP 11 1916

F. D. Monckton,
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LOUIS E. BEAN,
Attorneys for Plaintiff in Error.

STATEMENT OF THE CASE

This action was brought by plaintiff to recover advances amounting to \$3,001.00 on a hop contract for the purchase of 30,000 pounds of hops of the defendants, during the season of 1912. The hops were to be

of first quality, that is: sound condition, good and even color, fully matured but not over-ripe, flaky, cleanly picked, properly dried and cured, free from sweepings and other foreign matter and not affected by spraying or vermin damage. That the defendants grew some 40,000 pounds of hops upon their premises, and upon inspection of the said hops plaintiff avers that they were found to be slack dried, bad and uneven in color, of unsound condition, not fully matured, not properly dried or cured, and affected by vermin damage. Plaintiff introduced numerous expert hop inspectors as witnesses, who gave testimony that the said hops, upon inspection, were of a bad and uneven color, of an unsound condition, not fully matured, not properly dried and cured, and that they were affected by vermin damage. The contest between the parties turns around these points.

The defendant set up an affirmative answer that the hops raised by him complied with the contract and that the plaintiff's agents rejected the hops on the ground that the prices had gone down, and were unfair in their inspection, and asked for an affirmative judgment in the sum of \$900.00.

ASSIGNMENT OF ERRORS

I.

The Court committed error in permitting Ross H. Woods, one of the plaintiff's expert witnesses to answer the following question on cross examination,

over the objection of plaintiff as follows: Said witness was testifying with reference to the color of the hops and was asked this question:

Q. What you men mean to get at is the general average of the crop?

Objected to as incompetent, irrelevant and immaterial, which objection was overruled by the Court, and to which plaintiff saved an exception.

The witness answered: Well, yes. There was some of them green in each sample and some of them were ripe, mixed as you were talking a while ago about where those were dumped off the kiln floor.

(Record, pp. 26-123.)

II.

The Court committed error in permitting J. M. Edmunson, who was called as a witness in his own behalf, to answer the following question in attempting to discredit the inspection made by the plaintiff's experts:

Q. Now, what is your experience with hop inspectors as to their being uniform in their judgment as to the quality of hops?

Which question was objected to by plaintiff as incompetent, irrelevant and immaterial.

COURT:—I think that is an inquiry about the quality in effect of the hops. You may answer.

To which ruling the plaintiff duly saved an exception, which exception was allowed by the Court.

The witness answered: I find that they vary con-

siderable, one will call a hop prime and the other medium, etc., they will vary as much as one grade and some vary two grades.

(Record, pp. 27, 147.)

III.

The Court erred in permitting the defendant, J. M. Edmunson, to answer the following question, over the objection of the plaintiff:

Q. Now, what do you say as to whether at the time that Mr. Hinkle inspected these hops on the 31st day of October, that you had 30,000 pounds of hops there of the quality described in that contract?

(Record, pp. 27, 148.)

To which question plaintiff objected as incompetent, irrelevant and immaterial and as calling for a conclusion of the witness on this matter.

COURT:—He says he inspected the hops, he can give his judgment as to that amount; to which ruling of the Court the plaintiff duly excepted, which exception was allowed by the Court, and witness answered:

I considered that I had more than enough hops of the quality that would be sufficient, that would go on the contract. There was perhaps 50 bales or 60, between 50 and 60 bales, hops extra, besides enough. I had over 40,000 pounds according to my recollection, in the whole crop.

John Edmunson had already testified as follows:

(Record, p. 145.)

Q. Now, from your inspection of those hops, what would you say as to their quality?

A. I call them a good hop.

Q. What is your opinion as to what quality they were?

A. Well, I considered that I had over 20,000 pounds of choice hops in the lot.

COURT.—Over how many?

A. Twenty thousand pounds. And the rest of the hops would grade prime, with the exception of what they call the ripe end. That was the seven or eight bales that they called over-ripe, and the ends of the leaves were turned red.

COURT.—That is the last picking.

A. That was the last picking, your Honor. What they would grade those, I could not say exactly.

IV.

Bert Pilkington was called as a witness on behalf of the defendants, and after testifying to his qualifications as a chemist, as more fully shown hereafter in quotations from Bill of Exceptions, and while testifying in regard to the chemical analysis of the hops was interrupted by the objections to the witness' testimony along the line of chemical analysis of hops as incompetent, irrelevant and immaterial and an attempt to impose in this case a standard different than that of the hop men. (Record, pp. 28, 188.) The Court made the following ruling:

There has been testimony here coming from

the witnesses produced by the plaintiff touching the amount of resin or pollen, as it has been described, or the lupulin that is contained in these hops, some saying that it had more and some less, and that seems to be the prime quality of the hop. If this witness is competent to testify concerning the quantum of that lupulin in the hops, or the specimens that he examined, I think that would be proper to go to this jury. To which ruling an exception was duly saved.

The said ruling is assigned as error. The Court committed error in overruling the objection and in making the said ruling.

V.

The Court erred in permitting the witness, Bert Pilkington, to testify with reference to a sample of hops furnished him by J. M. Edmunson.

(Record, pp. 29, 189.)

Q. Now, what percentage of resin did you find in these hops?

Objected to as incompetent, irrelevant and immaterial; to which ruling an exception was duly saved. The witness answered: Why, the sample Edmunson handed me had 18.15 per cent total resin, and of that total resin, there was 16.24 what is known as soft resin.

VI.

The witness, Bert Pilkington, testified that he had received from hop growers and dealers samples of hops marked with the grading, and the Court

committed error in permitting said witness to answer the following question:

(Record, pp. 29, 193.)

What quality of hops were they claimed or styled to be, and the previous objection was renewed, which was that the testimony is incompetent, irrelevant and immaterial, a matter of hearsay only. The witness was not competent to judge. The objection was overruled, to which ruling an exception was duly allowed. Witness answered:

Why, some of them were graded fancy, some choice, some prime, some medium. I don't think we had a sample marked "poor" in the entire lot.

The Court then asked the witness if he knew what a choice hop is in the market, and he answered: I cannot go out in the market and pick out a choice hop by just going around and feeling of it, or looking at it.

VII.

After some colloquy between the Counsel and the Court, and questions by the Court, the Court sustained the objections to this witness testifying with reference to the quantity of resin in the samples of hops sent him by other parties, and was excused.

The Court afterwards had the witness recalled and permitted him to testify over the objection of the plaintiff as incompetent, irrelevant and immaterial, and hearsay, which objection was overruled by the Court and exception duly allowed.

That the Court committed error in reversing the ruling and permitting the said witness to testify. The witness testified as follows:

One sample of choice hops by Judge No. 1, 1911 crop, contained 19.42 per cent total resin; and the other sample of choice hops, by Judge No. 2, 1911, contained 19.46; and the other sample of choice hops, by Judge No. 3, 1911, contained 19.98 per cent total resin. Prime, 1911, by Judge No. 1, contained 17.23; next prime, by Judge No. 1, 1911, contained 18.83 per cent; and the next prime, by Judge No. 3, crop 1911, contained 20.19 per cent; the next prime, 1911 crop, Judge No. 3, 19.42 per cent; No. 2 Judge, 1911 crop, prime, 19.04 per cent. Now prime 1910 crop, by Judge No. 1, 15.95 per cent total resin. Medium—we have only two mediums. They are both 1910 crop. One is 17.21 per cent, by Judge No. 1. Another one is 13.46 per cent, by Judge No. 1.

(Record, pp. 30, 31, 202, 203.)

VIII.

That the Court erred in overruling the motion made by plaintiff to strike out all the testimony of the said witness, Bert Pilkington, as being incompetent, irrelevant and immaterial, and as assuming that a hop that contains eighteen per cent and a fraction, whatever this is, is a choice hop, or a hop that is a first quality under this contract, which motion was overruled by the Court, and the Court duly allowed an exception thereto.

(Record, pp. 31, 206.)

The material testimony given by the witness, Bert Pilkington, with the objections thereto and the rulings thereon and exceptions are more fully shown by quotations from the Bill of Exceptions for the purpose of showing the materiality of the said objections, and said motion is as follows:

(Record, pp. 31 to 41, 185 to 207.)

The witness testified that he was a graduate chemist, was employed in the chemical department of the Agricultural College of the State of Oregon, since 1905; that he had undertaken an investigation of the characteristics of hops.

Q. Please explain the character of the work?

A. Well, for instance, one of the particular features was a revision of the method of chemical examination of hops.

Q. What was the final object in obtaining this process of chemical analysis?

A. The thing that led up to that was the variation, or so-called variation, in the examination or the commercial judging of hops. And the attempt at that time—it was taken up as an Adams project, under the Adams fund, by the Federal Government, to see if they could arrive at some definite method for examining hops, whereby hops would be given examination according to their worth.

Q. Did you examine some samples of hops that he sent you in 1913?

A. Yes, sir, I did.

Q. About what time in the year was that?

A. That was somewhere between the 1st and the 10th of June, if I remember right. I don't remember the exact date.

Q. Now, did you make a chemical analysis of those hops to ascertain the amount of brewing quality in them?

A. Well, the chemical analysis shows the resin quantity.

MR. WILLIAMS:—We desire to make the objection to this witness' testimony along that line for the reason that it is incompetent, irrelevant and immaterial, and an attempt to impose in this case a standard different from that of the hop men.

COURT:—There has been testimony here, coming from the witnesses produced by the plaintiff, touching the amount of resin, or pollen, as it has been described, or lupulin that is contained in these hops, some saying that it had more and some less; and that seems to be the prime quality of the hop. If this witness is competent to testify concerning the quantum of that lupulin in the hops, or the specimens that he examined, I think that would be proper to go to this jury. You may proceed.

MR. BEAN:—We save an exception.

Q. Now, Professor Pilkington, you said you made a chemical analysis of these hops?

A. That Mr. Edmunson furnished me?

Q. Yes.

A. I did.

Q. And according to the scientific method used for that purpose?

A. Yes, sir.

Q. Now, what percentage of resin did you find in these hops?

Objected to as incompetent, irrelevant and immaterial.

COURT:—I think I will hear that. The objection will be overruled.

MR. WILLIAMS:—We desire an exception, your Honor.

COURT:—Very well.

A. Why, the sample Mr. Edmunson handed me had 18.15 per cent total resin, and of that total resin there was 16.24 what is known as soft resin.

COURT.—What?

A. Soft resin. You might say there were three resins in the hop.

Q. What was the third resin?

A. That is what they call a hard or worthless resin. That amounts to the difference between the total resin and the soft resin; three resins comprising the makeup of that part of the hop.

Q. Did you ever make any examination of this kind of hops that are pronounced by experts as choice hops?

Objected to as incompetent, irrelevant and im-

material.

COURT:—Do you know what a choice hop is, in your experience; that is, choice hop measured by the commercial rule?

A. No, sir, I do not.

COURT:—You do not?

A. No, sir.

MR. SLATER:—Your Honor, I want to show that the percentage of resin found in this particular sample of hops—its relation to the percentage found in the hops of different qualities that he examined.

COURT:—Well, unless he knows the percentage that exists in the commercial hop of the different qualities, it doesn't seem that he would be competent to testify. If you can show by this witness that he is acquainted with commercial hops, and the amount of resin, for instance, in a prime hop, or a choice hop, or a medium hop, then his testimony would be competent on that point.

Q. Now, what different qualities of hops were these samples that you received; represented to you to be, by those who gave them to you?

MR. WILLIAMS:—Objected to as incompetent, irrelevant and immaterial; matter of hearsay only. The witness was not competent to judge.

Objection overruled. Exception allowed.

A. Do you mean by that the grading?

Q. Yes, what quality of hops were they claimed or styled to be?

MR. WILLIAMS:—I desire to renew our objection, your Honor.

Objection overruled. Exception allowed.

MR. SLATER:—That will be understood.

A. Why, some of them were graded fancy, some choice, some prime, some medium. I don't think we had a sample marked "poor" in the entire lot.

COURT:—Do you know what a choice hop is in the market?

A. I couldn't go out in the market and pick up a choice hop, just by going around and feeling of it, or looking at it.

COURT:—Do you know the amount of resin there should be in a choice hop as sold in the market?

A. That would depend on who judge the hop.

COURT:—That would depend on what?

A. That would depend on who graded the hop, whether it was a choice hop, or prime hop, or medium hop. That was what this work was for. I might say, in explanation, what this work was for was to compare these different gradings by different judges.

COURT:—Then there is no uniformity in grading?

A. Not according to these different judges; they don't agree.

MR. WILLIAMS:—That is the very vice, your Honor.

COURT:—That is the kernel of the cocoanut in this case, it seems to me, the very thing we are try-

ing to get at now. Now, if you know what a choice hop is in the market, why then you can measure your chemical analysis of your resin in the hops you have examined with choice hops. Otherwise, I don't see that we can get a correct estimate in this case upon this particular question.

MR. SLATER:—Your Honor, I think his testimony may be relevant to show the percentage of resin in this particular hop as compared with other samples of hops known in the market as choice, medium and prime, the percentage that might be in them. It is true this witness might not be competent to testify that he can pick out a choice hop.

COURT:—He says he doesn't know, of his own knowledge, what a choice hop is; nor a prime, nor medium. He says that knowledge he has comes from samples of hops that have been sent to him which have been represented to be so and so. Then he says the judges themselves don't agree upon what is a choice hop, and the amount of resin that should be contained in a choice hop. That is the trouble in making the comparison here.

MR. SLATER:—Well, your Honor, in order to make the record than, we desire to show by this witness that this witness made chemical analysis of a large number of different grades of hops, and that the averages run from 13.49 per cent; and that the minimum percentages for the year in which he made the examination in question was 15.54 per cent; the

maximum was 20.49 per cent, and the average 18.06 per cent. That is the testimony that we offer to show by this witness.

COURT:—You don't know, of your own knowledge, about the samples, whether they were choice or prime or medium as to quality?

A. No. We didn't care for that on this other work we were undertaking. We asked—if I may make an explanation there?

COURT:—Yes.

A. We asked that these judges, or asked that Mr. Livesley to send us in a sample of hops judged by different judges, and then we wanted to analyze those hops, and see how those judges agreed. Now, that was the object of that piece of work that we undertook at that time. Now, those hops were graded according to the terms on the hop market.

COURT:—You were inquiring only as to one quality, and that was the quality of the amount of lupulin?

A. No, I might say this—well, that was the standard by which we were measuring; that is, the resin—to see if the resin in a choice hop graded by Judge No. 1 would agree with Judge No. 2, or whether medium graded by one judge, a hop graded by one judge as a medium would have the minimum amount of resin equal to a choice hop graded by another judge; to see if a medium fell in a definite class—if their judgment compared as to the amount of

resin it contained.

COURT:—I don't think that that elucidated anything in this case particularly. I will sustain the objection, and you may have your exception.

Excused.

COURT:—Is Mr. Pilkington here?

MR. SLATER:—He was out in the hall a moment ago.

COURT:—I think I will take his testimony in regard to the amount of resin in the samples. After thinking that matter over, I think it would be a better ruling to let that go to the jury.

MR. WILLIAMS:—We will take an exception, if your Honor please.

COURT:—You may have your exception.

BERT PILKINGTON.—Resumed the stand. Direct examination continued.

COURT:—I have concluded that you might answer as to the amount of resin you found in these different samples. I think the manner in which you obtained the samples has been sufficiently explained heretofore. You may have your objection, and your exception to the Court's ruling.

The witness was then permitted to refer to memorandum written by him with reference to hops of different qualities.

COURT:—Well, now, who are the judges?

A. I don't know who the judges were. Mr. Livesley furnished these samples. The pamphlet

there states how those samples were procured and the object of getting those. These samples were numbered, and the grade was put with that number in the letter sent to us, and the samples forwarded at the same time.

Q. Is Mr. Livesley a regular dealer in hops, in this state?

A. Yes.

Q. An extensive dealer?

A. He was at that time, yes.

Q. Do I understand you that Mr. Livesley furnished all these samples?

A. Those samples that are given there? No. Mr. Livesley did not furnish all the samples. Mr. Seavey furnished part of the samples. If I remember right, the larger number of the samples were received from Mr. Livesley.

COURT:—I think you may give the names of gradings according to the samples sent you, the judging of those samples. Just give the general range. Take the prime, for instance. Take the choice, for instance, and then prime, and indicate it.

A. All right. One sample of choice hops by Judge No. 1, 1911 crop, contained 19.42 per cent total resin; and the other sample of choice hops, by Judge No. 2, 1911, contained 19.46; and the other sample of choice hops, by Judge No. 3, 1911, contained 19.98 per cent total resin. Prime, 1911, by Judge No. 1, contained 17.23; next prime, by Judge

No. 1, 1911, contained 18.83 per cent; and the next prime, by Judge No. 3, crop 1911, contained 20.19 per cent; the next prime, 1911 crop, Judge No. 3, 19.42 per cent.

COURT:—What was that that contains 15 per cent?

A. I haven't come to that one yet. I will get that in just a minute. No. 2 Judge, 1911 crop, prime 19.04 per cent. No. ..., prime, 1910 crop, by Judge No. 1, 15.95 per cent total resin.

COURT:—So the prime varies all the way from 15.95 to about 20 per cent.

A. To about 20½.

COURT:—Well, now, give the medium.

A. Medium—we have only two mediums. They are both 1910 crop. One is 17.21 per cent, by Judge No. 1. Another one is 13.46 per cent, by Judge No. 1.

At the close of the witness' testimony, plaintiff made the following motion:

MR. WILLIAMS:—To save the question, we move to strike out all the testimony of this witness, as being incompetent, irrelevant and immaterial, and as assuming that a hop that contains eighteen per cent and a fraction, whatever this is, is a choice hop, or a hop that is of a first quality under this contract.

COURT:—The motion will be overruled. You may have your exception.

IX.

That the Court erred in denying the plaintiff's

motion for a new trial and abused his discretion by refusing to grant a new trial, which motion was based upon the following grounds, to-wit:

(Record, pp. 24, 41-44.)

First. That the verdict is against the evidence in this cause.

Second. That there is no evidence in this cause to sustain the verdict of the jury; that there is no evidence that there were 30,000 pounds or anywhere near that number of hops of the quality described in the contract produced by J. M. Edmunson during the year 1912.

That the only testimony in this cause given on behalf of the defendants that there were 30,000 pounds of hops raised by them of the quality described in the contract that could possibly tend to show that fact was the answer of J. M. Edmunson to the following question:

Q. Now, what do you say as to whether at the time that Mr. Hinkle inspected these hops on the 31st of October, that you had 30,000 pounds of hops there of the quality described in that contract?

A. I considered that I had more than enough hops of the quality that would be sufficient, that would go on the contract. There was perhaps 50 bales or 60, between 50 and 60 bales, hops extra, besides enough. I had over 40,000 pounds according to my recollection, in the whole crop.

That witness was testifying with reference to a

conversation he had with Mr. Hinkle with reference to quantity, said: I had more than the contract called for, and they had the privilege of selecting from the whole bunch, from all the bales, and he was asked this question:

Well, what was said, if anything, by you as to the quality of the hops?

A. I told him I thought I had hops good enough to fill the contract, a sufficient number of them.

This was all the testimony given by J. M. Edmunson along that line. He then testified in answer to this question:

What is your opinion as to what quality they were?

A. Well, I considered that I had over 20,000 pounds of choice hops in the lot.

COURT:—Over how many?

A. Twenty thousand pounds. And the rest of the hops would grade prime, with the exception of what they called the ripe end. That was the seven or eight bales that they called over-ripe and the ends of the leaves were turned red.

Then in answer to this question:

Now you may state to the jury to what, if any, extent any of these hops were affected by mold?

A. Well, there was about 20,000 pounds of them that didn't have any mold, you might say. I call them free of mold. And the rest of them ran along gradually until the end of the season and they had

some little mold in them; until the final end, the last day or two of picking, they had considerable mold in them and were over-ripe.

Then on cross examination, the witness was asked:

Q. How did you make your calculation that there were about 20,000 pounds that were choice hops?

A. Well, Mr. Woods picked out about 20,000 pounds that he claimed was the best of the hops. I never picked out the exact amount myself, because I was not grading them, but it ran fully that much or more; how much more they would run, I don't know.

Then witness was asked this question: And these 20,000 pounds were not affected by spraying or vermin damage?

A. No, sir.

Q. Now, how about the second lot, John?

A. Well, the second lot had a small amount of mold in them. That was all the difference. They were really a riper and better hop.

Q. There was some mold in the second carload?

A. Yes.

Q. Sufficient to make them take a lower grade?

A. No, I don't know. It is the way I graded them anyway. They were a good prime hop, and a prime hop is not supposed to be perfect.

POINTS AND AUTHORITIES

1. "The average of the crop" does not come within the terms of the contract. There could be no

average "good and even color under the contract; nor average maturity; nor average freedom from vermin damage, etc."

8 Oregon 517-518, Tenny vs. Mulvaney.

24 Oregon 320; 33, p. 573, Johnson vs. Hamilton.

2. The question asked Mr. Edmunson with reference to his experience as to the uniformity of the judgment of hop inspectors was undoubtedly asked for the purpose of discrediting the testimony of the hop inspectors of plaintiff and his witnesses on that subject. This question would tend to prove nothing of probative value in this case; but would tend to prejudice the jury against all hop inspectors and the witnesses in particular; and this was undoubtedly its purpose.

The ruling of the Court thereon was another error. It would be impossible for Mr. Edmunson's experience with hop inspectors to have any probative value as to the quality of the hops in dispute.

The conclusion that must be drawn from this testimony for it to have any probative value is:

In the experience of Mr. Edmunson some hop inspectors differ in their judgments in the grades of hops; some one grade and some two grades; therefore all hop inspectors differ in their judgments; and because all hop inspectors differ in their judgments the plaintiff's witnesses differ in their judgments, and because they differ in their judgments generally, they should differ in their judgment of hops in this

case; therefore, not differing in their judgments in this case there is collusion among them, or therefore they are prevaricating in their testimony when they say there is no material difference in their judgments generally; and the further conclusion, therefore, the hops were, or probably were, of the quality described in the contract.

The question before the jury was whether the jury could rely upon their testimony about the quality of and defects in these hops, and testimony that some hop inspectors differed in their judgment would not prove or tend to prove that these inspectors were wrong in the particulars testified to or to discredit them.

132 Mass., at p. 224, *Pond vs. Pond*.

3. The defendants, under their counter claim to prevail thereon were required to prove that the defendants had 30,000 pounds of hops of the quality prescribed in the contract. Mr. Edmunson had already testified to the quantity of his hops and to the grades. That testimony fell far short of proving the counterclaim; so he was asked the direct question calling for his opinion. The question called for an opinion on the ultimate fact that the jury were required to pass upon.

39 Oregon 117, *State vs. Simonis*.

41 Atlantic 838, *Bergen Co. Traction Co. vs. Bliss*.

12 Am. & Eng. Encyc. Law (2 Ed.), 421-3.

5 Oregon 480, Wilson vs. Maddock.

The question and answer were evidently based on the assumption that hops that graded prime in the opinion of the witness were of the quality prescribed by the contract.

A question or answer which assumes a fact is incompetent.

8 Oregon 519, Tenny vs. Mulvaney.

The witness had already testified to the quality of the hops and their various grades as he judged them. The jury were then in the possession of the facts upon which this witness' opinion was given, and the opinion was not warranted by the facts and the witness afterwards contradicted it by facts; but it gave the jury the only basis they had for finding on the counterclaim.

4. The first objection to the testimony of Mr. Pilkington went to the whole of his testimony as incompetent, irrelevant and immaterial, and an attempt to impose in this case a standard different than that of the hop men.

This was the purpose of this witness' investigations, and he was permitted to testify freely thereto.

71 Oregon 612-613, Netter vs. Edmunson.

5. The testimony of the witness Pilkington in the 5th Assignment of Error was a mere abstract question of science, a statement of a fact that was of no value to any issue in the case. The witness did not at any time attempt to testify as to the amount of

resin in a mature hop, and this answer furnished no standard by which the jury could judge the question at issue whether the hops in question were mature or immature.

71 Oregon 611, Netter vs. Edmunson.

20 Am. & Eng. An. Cas. 205, State vs. Marvin.

Expert evidence should be carefully guarded. It is sufficiently dangerous when carefully circumscribed. It becomes altogether too unreliable when the basis of it is indefinite.

58 Atl. 940, Ivins vs. Jacob (N. J.).

11 R. C. L. 582, par. 13.

The testimony was to a single sample out of over 200 bales, and would be of no value on that account.

44 Pac. 546, Coast Elevator Co. vs. Bravinder, (Wash.).

18 Atl. at p. 918, Baltimore U. P. Co. vs. Baltimore.

Mr. Edmunson himself testified that every bale was tested by the buyer and regular samples for inspection in shipping were taken out of every tenth bale.

(Record, pp. 142, 143.)

6. The question in the 6th Assignment of Error called for hearsay testimony. The witness knew nothing about the quality of hops himself, and was relying upon the marks on the samples sent him.

9 Fed. 66, Pope vs. Filley.

He disclaimed *any* knowledge of the commercial

grades of hops.

132 Mass. 217, Perkins vs. Stickney.

130 U. S. 526, Stilwell Man. Co. vs. Phelps.

7. The Court at first rightfully sustained the objection to Mr. Pilkington testifying to the quantity of resin in the hops sent him by other parties; then the Court reversed the ruling and permitted an exception. The original ruling was:

“Unless he knows the percentage that exists in the commercial hop of the different qualities, it doesn’t seem that he would be competent to testify. If you can show by this witness that he is acquainted with commercial hops, and the amount of resin, for instance, in a prime hop, or a choice hop, or a medium hop, then his testimony would be competent on that point.”

(Record, pp. 34, 190-1.)

This was followed finally by this ruling:

“Now, if you know what a choice hop is in the market, why then you can measure your chemical analysis of your resin in the hops you have examined with choice hops. Otherwise, I don’t see that we can get a correct estimate in this case upon this particular question.”

The witness testified to the amount of resin that he found in the samples he examined.

The facts stated by this witness, coupled with the purpose of the offer as stated by Mr. Slater and other testimony, enabled the defense to build up the

theory. That the *average* sample of the Edmunson hops (Record, pp. 143, 195-6) was the *average* of the crop. That that sample had 18.15 per cent of total resins. That the *average* of total resins in the samples upon which Mr. Pilkington experimented was 18.39. That 18.39 per cent was the necessary amount of total resins to show that the hop was an *average* mature hop. Therefore the Edmunson hops were an *average* mature hop and within the contract.

Without the fact being shown, the jury, by this evidence, were asked to find that a hop containing 18.39 per cent of total resins were within the contract quality.

That there were 30,000 pounds of the Edmunson crop containing 18.15 per cent of total resins, and therefore there were 30,000 pounds of the Edmunson crop within the contract quality.

4 Atl. 575, Cole vs. Boardman.

92 U. S. 283-4, U. S. vs. Ross.

8. The 8th Assignment of Error is the motion to strike out all of the testimony of the witness Pilkington as incompetent, irrelevant and immaterial, and for the further reason that it assumes the proposition that a hop containing 18.15 per cent of total resins brings it within the quality described in the contract.

The Court ruled on the objection in the 4th Assignment of Error: There has been testimony here, coming from the witnesses produced by the plaintiff,

touching the amount of resin, or pollen as it has been described, or lupulin that is contained in these hops, some saying that it had more and some less; and that seems to be the prime quality of the hop. If this witness is competent to testify concerning the quantum of that lupulin in the hops, or the specimens that he examined, I think that would be proper to go to this jury.

This ruling brings the case clearly within the decision of the Supreme Court of Oregon in *Netter vs. Edmunson*, 71 Oregon at p. 612.

“It may be said of all this evidence that it was immaterial; but it must be quite apparent that the evidence was well calculated to mislead and prejudice the jury in favor of the defendant, and plaintiff is entitled to a new trial.”

4 Atl. 576, *Cole vs. Boardman*.

9. The 9th Assignment of Error is that the Court abused its discretion in denying plaintiff's motion for a new trial on the ground that there was no evidence in the case to sustain the judgment against the plaintiff.

To sustain the judgment, it was necessary that the defendants prove that they had enough hops of the quality described in the contract. The testimony as to the quantity over 20,000 pounds was mere conjecture, opinion, surmise and assumption, that forms no basis for an affirmative judgment. The principal testimony of this kind being the answer in the

3rd Assignment of Error, which the witness himself afterwards contradicted. (See pages 152, 160, record.)

“While it is a general rule that the allowance or refusal of a new trial rests in the sound discretion of the Court and will not be interfered with on a writ of error, it is well settled that this rule has no application where such allowance or refusal results from a clear abuse of discretion.”

149 Fed. 141, McNicol vs. New York Life Ins. Co.

ARGUMENT

I. The first assignment of error is not very important in itself, but as the basis for a theory put forward by the defense in this case it becomes a potent factor in the trial before the jury.

Primarily, as the question and its immediate predecessors show, it was applied to the color of the hops. (Record, p. 123.) The counsel for the defense grasped the difficult problem of describing a “good and even color” of a hop, and made the most of by a severe cross examination of the witnesses; then came this question as the climax.

The colors of the hops were very fully described by the various witnesses. Some of the hops, 29 bales, were slack dried, two bales perished, there were brown buds in many of the bales, no one could possibly tell, describe or even guess what the *average* color of this crop of hops was. There is nothing in the contract that would warrant the jury in finding that

the *average* color of the crop came within the terms of the contract, and such a color could only be surmised or guessed at. It was wholly irrelevant to any issue in the case.

In the case of *Tenny vs. Mulvaney*, 8 Ore. 518, Lord, C. J., says with reference to the question of *average* logs under the contract:

“The contract was a written one, and the kind of logs to be furnished specified, and it was the agreement of plaintiffs to cut from the standing timber, within a mile from the bank of the creek, such logs only, without regard to the rotten trees and inferior timber, as would comply with the terms of the contract.”

II. The question in the second assignment of error called for the experience of the defendant, J. M. Edmunson, as to the uniformity of grading by hop inspectors. The question before the jury was as to how far they would credit the examination and inspection of the hops by plaintiff's witnesses and their credibility in exactly describing the results of that inspection.

That there are experts and experts in the hop trade, the evidence in this case shows. Witnesses Hinkle, Bolam, Hart, Zeller, and Irwin, were all men who had large experience in the hop trade. Hayes, Edmunson and Heyer all had considerable experience in the hop business, but, as a rule, none of them were permitted to buy hops on their own inspection.

Heyer places some 20,000 to 25,000 pounds of these hops two grades higher than the plaintiff's witnesses. Edmunson does the same, and then places the remainder one grade above. Here, then, in the case itself, we have the lack of uniformity in the grading of hops by hop inspectors to the degree testified to by Edmunson. This shows that there are grades of inspectors, as well as grades of hops.

But the question objected to was asked with all seriousness as substantive evidence, and accepted as such by the Court, who ruled: "I think that is an inquiry about the quality, in effect, of the hops." And the jury having heard this ruling, certainly gave it force and effect in their verdict.

III. Mr. Edmunson testified that he *considered* that he had over 20,000 pounds of choice hops and that the rest would grade prime, except the seven or eight bales at the ripe end, the last picking. (Record, p. 145.) He then testified about the slack bales and described a medium hop, and immediately following was asked the question objected to calling for his opinion.

Being asked about the mold, he said, there was about 20,000 pounds that were free from mold, you might say. I call them free of mold. (P. 150, Record.) On cross examination he was asked:

Q. How did you make your calculation that there were about 20,000 pounds that were choice hops?

A. Well, Mr. Wood picked out about 20,000 pounds that he claimed was the best of the hops. I never picked out the exact amount myself, because I was not grading them, but it ran fully that much or more; how much more they would run I don't know. (P. 152, Record.)

Again he testified:

Q. There was some mold in the second carload?

A. Yes.

Q. Sufficient to make them take a lower grade?

A. No, I don't know. It is the way I graded them anyway. They were a good prime hop, and a prime hop is not supposed to be perfect. (P. 156, Record.) Again he testified:

A. If they had taken enough, aside from the 20,000 pounds to fill out the contract, they would have had to take hops in which there was some mold.

A. There might have been some mold in it, yes. (P. 157, Record.)

The witness was laboring hard to show the jury that he had a crop of hops from which he could furnish enough to comply with the terms of the contract. This witness was graduated from the University of Oregon and had been admitted to the bar. (P. 161, Record.) He, therefore, could not be said to be at all ignorant of the force and effect of the English language. The Court's attention is called to the very careful manner of the witness not to testify positively to any fact with reference to the quality of

the hops. He says he *considered* that he had 20,000 pounds of choice hops. The verb *consider* means: "To think deliberately about; reflect upon; to give close attention to; ponder. 2. To regard in a certain aspect; look upon; hold; estimate." Standard Dictionary.

So that in the strongest use of the word, it was nothing more than an estimate of the amount. Again he *called* them "free of mold." "It is the way I graded them."

He *considered* he had 30,000 pounds of hops that were within the contract quality. In other words, he thought he had that quantity; he estimated he had that quantity. He never made a positive statement that he had that quantity and was very careful not to do so.

The witness at the time this question was asked had testified to the quantity of hops and the commercial grades, and the question and answer both assumed that a prime hop came within the terms of the contract, and he also testified that he did not know what a first quality hop was. (P. 168, Record.)

We submit that there was no necessity in this case calling for the opinion of the witness on the fact that the jury were required to pass upon; that was based upon unwarranted assumption and a mere guess.

IV, V, VI, VII, VIII. Assignments of error numbered four, five, six, seven and eight, all go to

the testimony of the witness Bert Pilkington, chemist in the Agricultural College of the State of Oregon. The quality of the hops in dispute herein as defined by the contract were as follows: "The said hops covered by this instrument shall be of first quality, i. e., of sound condition, of good and even color, fully matured but not overripe, flaky, cleanly picked, properly dried and cured, and free from sweepings and other foreign matter and not affected by spraying or vermin damage."

Plaintiff's witnesses testified that some of the hops were immature, and this was shown by a deficient quantity of lupulin in the hops inspected.

The Court held that the lupulin seemed to be the prime quality of the hops, and permitted this witness to testify as to the quantity he found in the samples sent him by Mr. Edmunson. This witness had adopted the theory that he could tell by the quantity of lupulin in the hop whether or not the hops had been judged correctly by different judges, and it was this theory that hop inspectors varied so much in their judging hops that it was necessary to prove some standard by which to test them.

The fourth assignment of error was not only on the ground that the testimony of the witness was incompetent, irrelevant and immaterial, but that it undertook to impose in this case a standard different from the hop men themselves in judging hops, and his theory of this matter was clearly incompetent and

irrelevant to the issues in this cause.

The defendants, by the testimony of this witness, sought to prove from the questions objected to in the fifth, sixth and seventh assignments, three facts. In the fifth that the sample of hops examined by the witness contained 18.15 per cent of total resins; that this amount of total resins in a hop showed a mature hop, or that it showed a hop that came within the quality in the contract provided. It was a mere assumption.

By the sixth assignment they undertook to prove that the witness had analyzed a number of samples of mature hops and sought to prove this by marks on the hops that had been sent to him for analysis. This witness was absolutely ignorant of the inspection of hops to determine their commercial quality in the usual way, nor did he add any testimony that he knew the amount of lupulin or resins necessary to a mature hop.

Then by the seventh assignment of error they undertook to prove from these samples that this witness had analyzed, what the average was of resins for a mature hop.

The witness himself testified to the quantity or percentage of resins in each sample, leaving it to the inference of the jury to draw the conclusion sought to be proven. He testified that he had analyzed twelve samples and was permitted to read from a pamphlet published by him what the amount of res-

ins were in each one of these samples. There was no attempt to show by any competent testimony that these samples that he had analyzed were mature hops, other than that they were classified, by somebody unknown, as "choice," "prime" and "medium," and the offer of this testimony made by the counsel for the defendants, was that they showed the average of 18.06 per cent of total resins, meaning for the jury to draw the inference that that was the average amount of resins in mature hops.

John Edmunson had testified that the sample he selected was an average sample of the crop. (P. 143, Record.) And this testimony was given without objection for the reason it seemed to be and only appeared to be preliminary, and this connected with the question objected to in the first assignment of error, gave the jury apparently the right to draw the inference that they had a right to determine that the contract quality was only for an average of the crop; that these samples mentioned in assignment number five were an average of the crop and that it contained 18.15 per cent of total resins; but the average of the samples analyzed by the witness contained about the same quantity; therefore the Edmunson hops had about the average quantity of total resins for a mature hop; therefore the hops were a mature hop. Aside from the testimony of Mr. Edmunson, mentioned in the third assignment of error, this was the only other testimony from which the

jury could possibly in any way infer that the defendants had 30,000 pounds of hops of the contract quality.

The testimony of the witness, Mr. Pilkington, gave a basis for nothing more than a guess and surmise and was utterly unreliable, incompetent and irrelevant and did not prove or tend to prove any issue in the case.

The witness did not show that he knew the quantity of resins in mature hops grown in the state of Oregon, or anywhere else. His testimony shows that he was a mere experimenter and nothing more, and upon a subject of which he was absolutely ignorant.

There is another element of uncertainty and doubt in this witness' testimony with reference to the hard and bitter resins. It is not shown by him, or in any other way, that these worthless resins run even through these hops or any other hops. This is left to inference and assumption.

The ruling of the Court was right in the first instance. That unless the witness could tell what the amount of resin was that was necessary for a choice hop, or a prime hop, or a medium hop, he would be incompetent to testify, and his testimony would not be competent, would be irrelevant to any issue in the case.

At the close of this witness' testimony a motion was made to strike out all his testimony as incompetent, irrelevant and immaterial, and for the further

reason that it assumed that a hop containing 18.15 per cent of total resins was a mature hop, or a hop within the terms of the contract.

The reading of the witness' testimony in this cause will show that it was highly prejudicial to the plaintiff's case and tended to inflame the minds of the jury and prejudice them against hop inspectors generally, and we submit that all this witness' testimony, and particularly the parts assigned as errors, is incompetent, irrelevant and immaterial to any issues of this cause, was confusing to the jury, had a tendency to mislead them and was highly prejudicial and assumed facts which were not in evidence.

A careful reading of all the testimony in reference to the quality and quantity of hops raised by Mr. Edmunson under this contract will disclose the fact that the plaintiff made an exceedingly strong case against the defendant; that this testimony was not overcome by the defendants' testimony; his own witnesses are against him, one of them, Frank S. Johnson, was strongly so, and Frank Heyer testified that there were only between twenty and twenty-five thousand pounds of hops that came within the contract, and the testimony of this witness further discloses all over the 20,000 pounds were a mere guess on his part, so that the case rested entirely, so far as the jury was concerned, upon the opinion of J. M. Edmunson and the unwarranted inference from the

testimony of Bert Pilkington, and the result arrived at by the jury giving an affirmative verdict against the plaintiff could only have been arrived at through prejudice brought about by the errors complained of herein. Viewing this testimony as a whole, it is apparent upon the face of this record that the errors complained of were vital elements in the trial of the case and the objections thereto of the plaintiff should have been sustained.

IX. The ninth assignment of error is the denial of the motion for a new trial. We realize the fact that the Courts have repeatedly held that an assignment of error based upon a denial of a motion for new trial will not be heard on Writ of Error, and yet there are authorities and it is a well established principle that this may be done when the Court has abused its discretion.

In this case there was no competent testimony upon which the jury could base an affirmative verdict in this case. Whether or not there was any testimony is a question of law for the Court, if there was not, it was of course a matter of weight for the jury, but we submit in all candor that the only parts of this testimony upon which the jury could at all base its finding for an affirmative verdict was no testimony at all, but only inference, surmise and guess.

We therefore submit that the Court abused its discretion in refusing to grant a new trial.

We respectfully submit that upon the errors com-

plained of the plaintiff is entitled to a reversal of this judgment and a new trial before a jury.

Respectfully submitted,

WILLIAMS & BEAN,

Attorneys for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth District

MAX WOLF,
Plaintiff in Error,

vs.

J. M. EDMUNSON and M. J. EDMUNSON,
Defendants in Error

BRIEF OF DEFENDANTS IN ERROR

Upon Writ of Error to the District Court of the
United States for the District of Oregon.

MANNING, SLATER & LEONARD,
Attorneys for Defendants in Error.

FILED
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United States
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MAX WOLF,
Plaintiff in Error,

vs.

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Defendants in Error

BRIEF OF DEFENDANTS IN ERROR

STATEMENT OF CASE.

On May 29th, 1912, the defendants in error entered into a written contract with the firm of Klaber, Wolf & Netter, whereby they agree to sell and deliver to said firm at Goshen in Lane County, Oregon, on and between October 1st and October 31st, 1912, 30,000 pounds net weight of hops to be raised during the year 1913 by said J. M. Edmunson on the farm of his mother, the said M. J. Edmunson. The said firm therein agreed to purchase said hops and to pay therefor twenty-five cents per pound at the time of delivery. The said contract particularly

specified the kind of hops that were to be produced and tendered to said firm, in this language: "The said hops covered by this instrument shall be of first quality, i. e., of sound condition, good and even color, fully matured, but not overripe, flaky, cleanly picked, properly dried and cured, and free from sweepings and other foreign matter, and not affected by spraying or vermin damage. Said hops shall not be the product of a first year's planting." The said purchasers were required to make advances to the seller for the cultivation and harvesting of the crop, and they did advance for those purposes the total sum of \$3,000.00. By the terms of the contract the purchaser had the first right of inspection and selection from the entire crop raised on the premises. During the year 1912 Edmunson raised on the farm 215 bales of hops and tendered them to the purchasers at Goshen. The purchasers by their agents pretended to inspect said hops on or about October 3rd, 1912, but examined only two bales and thereupon advised Edmunson that the hops were not of the quality described in the contract and that if he had no better hops than those examined the purchasers would not take them. At that time the market price of hops had declined to 16 to 20 cents per pound according to the opinion of different witnesses. On the evening of the 3rd of October or the morning of the 4th, the purchasers' agent returned to Goshen to make further inspection, but none was made at that time, it being mutually understood that

a full inspection might be made later and within a reasonable time. The purchasers' agent did not return for further inspection until the 31st day of October which was after the time provided in the contract for inspection and acceptance, the contract reading "between October 1st, 1912, and October 31st, 1912. (Bottom page 18, Transcript of Record.) At the last inspection the purchasers rejected the hops and demanded repayment of the advances made. The action is by Max Wolf, the surviving member of the partnership firm to recover the amount of the advances, alleging in effect, that the said firm on October 30th, 1912, inspected the hops tendered by Edmunson and found them slack dried, bad and uneven color, of unsound condition, not fully matured, not cleanly picked, not properly dried or cured, and affected with vermin damage, and for those reasons they rejected the hops and refused to take them under the contract. The defendants in error, by their answer denied the averments of the complaint as to the quality of the hops and alleged affirmatively, in substance, that J. M. Edmunson raised on the described premises in the year 1912 over 40,000 pounds of hops of the quality described in the contract and tendered them in time to said firm, but that because the market price of hops had fallen from the contract price of 25 cents per pound to about 16 cents per pound at the time of the inspection, they, the purchasers, did not act in good faith in inspecting the hops, but inspected only two

bales of hops about October 3rd, 1912, and rejected the entire lot, and that on October 31st and after the time for inspection had passed they again pretended to inspect, but acted arbitrarily and without cause rejected the hops. The defendants also counter claimed in damages, alleging that by reason of the wrongful rejection and delay they had caused them damages in the amount of \$3,900.00. Upon the trial of these issues the jury found for the defendants in error to the amount of \$400.00 and judgment was accordingly entered. The plaintiff has prosecuted this appeal from the judgment.

POINTS AND AUTHORITIES.

I.

If there is a specific agreement as to quality no additional condition will be implied or read into the contract by construction.

35 Cyc. 216.

Gieg vs. Wooliscroft, 52 Ill. App. 214.

Trotter vs. Hecksher, 42 N. J. Eq. 251.

II.

A designation of the article as "good" or "sound" means that it shall be of medium quality, according to the custom of the trade, and suitable for the purpose for which it is intended. But "good" does not imply any absolute quality but only that the article shall be good of its kind.

35 Cyc. 218.

III.

The defendants were not bound to a strict or literal compliance, but only to a substantial compliance of the contract.

3 Elliott on Contracts, Sec. 1878.

35 Cyc. 216.

IV.

Testimony as to quality of an article by observation, and the testimony of a chemist as to quality are of the same legal grade of evidence, and the exclusion of either would be illegal.

Jones on Evidence, 2nd Ed., Sec. 361, p. 453.

V.

The granting or refusing to grant a motion for a new trial rests wholly in the discretion of the court where it is made and the action of such court cannot be reviewed on error.

Wheeler vs. U. S., 159 U. S. 523.

Blitz vs. U. S., 153 U. S. 308.

Moore vs U. S., 150 U. S. 57.

New York etc. R. Co. vs. Winter, 143 U. S. 60-75.

4 Corpus Juris 831, Note (e).

ARGUMENT.

I.

It was competent and material for the witness Ross H. Woods to answer the question propounded

to him on his cross-examination as set forth in the first assignment of error. This witness was called by plaintiff to testify as an expert. He had assisted in inspecting the hops in question for the purchasers when they were re-sold in March, 1913, by the defendants in error. On direct examination he had testified in substance that he had graded the hops into three grades, putting 80 bales in the first grade, but in shipping them he put them into two grades, the first containing 103 bales; that they had certain defects; that they were a mixed lot; some were over ripe and some were green, mixed in the samples; some showed more mould than others, the mouldier ones would be the riper ones. (Page 113, Record.) On cross-examination, he testified that he did not exactly grade the hops as he had indicated in his direct examination, but only to get a better hundred, and he put 103 bales of that class in one car, and these he said "were a little evener in color and not so much mould in them." (Page 115, Record.) Then counsel for defendants proceeded to cross examine this witness at some length as to his expert knowledge of the different grades of hops and the general manner used by hop inspectors in testing the quality and grading of hops. After this witness had testified (page 123, Record), that some of the hops in question were over ripe and some of them green, he was asked this question: "Well, don't you know, as a matter of fact, that in picking a reasonably large yard, that the last of the picking usually

is a little riper than the first?" to which he answered "Yes." Then he was asked, "They cannot all be of the same color, can they?" and he answered, "Well, they can be practically so, yes; but not exactly the same. The first days of picking and the last days of picking will be a difference in color, that is very true." Following which the question, on which error is based, was asked, "What you men mean to get at is the general average of the crop." This question, as the court will be able to see from the context, was not asking the witness for his general average of the hops in question, but generally speaking, as to the manner of judging a crop. The answer of the witness, contains a statement not responsive to the question, but there was no motion to strike. The witness said, "Well, yes. There was some of them green in each sample and some of them ripe—mixed—as you were talking a while ago about when those were dumped off the kiln floor." It is ordinarily within the discretion of the presiding judge to determine to what extent the witness shall be cross examined on facts otherwise immaterial, for the purpose of showing bias or want of credibility. Commonwealth vs. Lyden, 113 Mass. 452.

II.

The second error assigned is no more forceful than the first. The plaintiff's case was made up from the evidence of so-called hop experts. The witness, Edmunson, himself had done work in that

line, and also had an extended experience as a hop grower. The accuracy of the methods employed by hop inspectors in judging the quality of hops was a fair question for investigation. It consumed a good part of the examination of those witnesses. The question and answer objected to do not necessarily question the veracity or good faith of plaintiff's witnesses. It goes to the accuracy of the result in judging of the quality by the method disclosed. In his reasoning on this point counsel wrongly assumes as a fact that his experts did not differ in their judgments on the quality of the hops in controversy. A perusal of the testimony recited in this bill of exceptions will disclose quite a variation in judgment as well as in reasons therefor. Hinkle when grading these hops, put 104 bales in No. 1, 80 in No. 2, 29 as slack dried and two as perished, and classed all of them as medium; but on cross examination he admitted that in a pinch the 104 bales marked by him as No. 1, would go as prime, the next grade above mediums (page 50, Record); while witness Woods found only 80 bales of the better quality, but on cross examination he admitted putting 103 bales in the best grade. Hinkle admitted on cross examination that experts in judging hops do sometimes disagree (page 54, Record). Harry L. Hart graded them as a lot from poor medium to an extreme high grade medium (page 68, Record). He based his judgment on the unevenness and rather dullish color and a little mould (page 70, Record), while Woods

and Hinkle found considerable mould in all of them. Pond vs. Pond, 132 Mass. 224, cited by counsel in no way supports his contention.

III.

The third assignment of error goes to the alleged incompetency of the question propounded to John Edmunson as to whether he had 30,000 pounds of hops there of the quality described in that contract. The objection is that the question calls for the conclusion of the witness. He was testifying as an expert hop man. He was qualified to state an opinion, but it is argued by counsel and his authorities cited seem to support that view, that before he may give an opinion he must state all of the relevant facts. We are not disposed to controvert this statement of the law. If, prior to the asking of the question he had not stated the facts on which he based his evidence, the question may have been objectionable, but we do not assent to the premises. This witness testified in chief at considerable length, beginning at page 129 of the printed record, about all of the material circumstances and surrounding facts that might affect the quality of the hop during its growth, harvesting, curing and baling, and denying the existence of all deleterious conditions, such as the existence of lice, lack of spraying, falling of the hops in the yard before being picked, overloading of kilns, picking too soon, picking too late, etc., supposed by plaintiff's witnesses to have existed in jus-

tifying their opinion as to the asserted poor quality of the hops.

He then, at page 145 of the Record, expressed the opinion that he had over 20,000 pounds of choice hops in the lot, and that the rest of the hops would grade prime, with the exception of what they call the ripe end, which amounted to 7 or 8 bales. Then witness explained the condition of the two bales testified to by plaintiff's witnesses as perishing, and the cause of that condition, following this on page 147 of the Record, witness gave the material qualities necessary in his opinion to make a choice hop, a prime hop, and a medium hop. At page 150 of the record witness stated that there was about 20,000 pounds of the hops that did not have any mould in them. The rest of them had a little mould in them. Then the question to which objection is made was propounded. We contend that as a matter of law, this record meets the conditions stated in counsel's authorities, so as to entitle the witness to express the opinion given. But if we should be in error about this, counsel on cross examination of the witness proceeded to supply any deficiency that may have theretofore existed. This cross examination begins at page 150 of the printed record. It goes through the whole gamut of the existence of mould, the color, maturity, over ripe hops, properly dried and cured and vermin damage. So that if there were error at the time in permitting witness to

answer the question objected to, it was thereafter cured by counsel for plaintiff in error.

Counsel opens his argument upon this assignment of error, with the statement that "the defendants, under their counter claim to prevail thereon were required to prove that the defendants had 30,000 pounds of hops of the quality prescribed in the contract." This is not correct; the plaintiff in error sued to recover advances made, alleging that defendants had breached the contract by failure to deliver hops of the kind and of the quantity agreed to be delivered. The burden was upon plaintiff to prove the issued made. If he failed in his proof, the necessary result of the proof is that defendants were entitled to recover on their counter-claim such damages as they may have suffered.

Whether the plaintiff made such a case was for the jury and they passed on that question against plaintiff's contention. The question propounded was not asking the witness for his opinion as to whether the hops were of the quality described in the contract, but as to the quantity of hops of that quality. Counsel say, "The question and answer were evidently based on the assumption that hops graded prime in the opinion of the witness were of the quality prescribed by the contract." There was no such assumption. Counsel is here applying his erroneous theory as a test of this witness's testimony. The theory of counsel in the trial of this case is that nothing but hops of choice quality as defined

by his experts will comply with the contract. We have contended and do now contend that counsel is attempting to import into the terms of the contract a test of quality not found there, as we will hereinafter show. Counsel then say in concluding their argument on this point, that "The witness had already testified to the quality of the hops and their various grades as he judged them." If so, then, the witness had a right to give his opinion as to the quantity of such hops and it was for the jury to say whether that opinion was justified.

IV.

The fourth assignment of error is based on a general objection interposed by counsel for plaintiff in error to the testimony of Bert Pilkington, an expert chemist, as to the amount of lupulin or hard and soft resins contained in the hops in question. The contention made by counsel in stating this alleged error, is that this manner of proving quality is "An attempt to impose in this case a standard different than that of hop men." The witnesses testifying for plaintiff in this case as experts in judging of the quality of hops, uniformly agreed that the lupulin in the hops was the prime element thereof for beer making purposes, and the amount of the lupulin contained in the hops was the measure of its maturity as a hop and indicated the commercial value thereof. The defendants' witnesses testified that the lupulin in the hops was the hard

and soft resins therein, and this was not controverted by plaintiff in error. The expert witnesses for plaintiff judged the amount of the lupulin in the hop, its soundness, maturity and value by observation. (Testimony, H. A. Hinkle, pages 52-53 of Record; Hal V. Bolam, page 63; James Hayes, page 106, and Ross H. Wood, page 125.) The defendants in error, by the testimony of witness Bert Pilkington, endeavored to establish the quality of the hop as to its maturity, that is the amount of lupulin in it, by the result of a chemical analysis. The contention of counsel that the attempt to prove quality by a chemical analysis imposes a standard different from that of the hop man is, as a fact, quite true, but the query is, is that a sufficient legal objection to the admissibility of the evidence. It is to us the assertion of a new and unheard of proposition of law that because one party to a contract for the sale of personal property has been accustomed to judge of the quality of the article sold, in a particular way, binds the other party to the use of the same method. Custom and usage of a community, when properly alleged and proven may become a part of contract, but the manner of proving, in a court of law, a question in dispute arising out of contract, is not limited by the terms of the contract either expressed or implied therein by force of custom and usage. A custom of determining quality by observation indulged in by one of the parties to a contract for any length of time can not import into

that contract a binding obligation upon the other party thereto to confine his evidence of quality to observation if in fact there is any other method at hand recognized by courts of law as a legal and proper method of making proof. Mr. Jones in his work on evidence, 2nd Ed., at Section 361, page 453, says, "The testimony of the chemist who has analyzed blood, and that of the observer who has merely recognized it, belong to the same legal grade of evidence, and though the one may be entitled to much greater weight than the other with the jury, the exclusion of either would be illegal." Citing *Peoples vs. Deacon*, 109 N. Y. 374, and *Com. vs. Sturdivant*, 117 Mass. 122, 19 Am. Re. 401.

Counsel in support of their contention cite *Netter vs. Edmunson*, 71 Ore. 612. That case is the same case as the one now before the Court. After securing a reversal of the judgment obtained in the lower court by the defendants therein, the plaintiff dismissed the case and brought this action in the Federal Court. The opinion of the State Court in that case seems to concede that the opinion of the chemist would have been competent if confined to proof of the soundness of the hops and not extended to the general quality of the hops. In the trial of this case we endeavored to avoid the criticism of that opinion by confining the testimony offered by Pilkington to proof of the soundness and maturity of the hop. The principle stated by the Court, namely, "The contract under consideration defined

the hops to be produced in terms which must be taken as the yard stick by which to measure their quality," is correct and the cardinal principle governing the contract and its interpretation. The Court in that opinion seems to admit that if the testimony of the chemist had been limited to the question of the "soundness" of the hop, that is the presence or absence of resin, it would have been material and competent. At the top of page 612 of the opinion, the Court says, "It is argued that the presence or absence of resin in large quantities affects the soundness of the hops, which was one of the components of the hops agreed to be delivered, and for that reason the testimony of the chemist was competent to go to the jury. We admit the logic that one is corollary to the other; still the objection remains that the testimony of the witness was not limited to an exposition of that element, but was given to the consideration of the jury upon the question of the quality of the hops." The word "quality" as there used by the Court evidently was intended to mean whether they were "choice," "prime" or "medium." That case was tried by the plaintiff, as he also tried this one, upon the erroneous theory that the contract in question described what is known in the hop trade as a "choice" hop, and all of the opinion evidence offered by the plaintiff as to the quality of the hops was measured by the definition given by Hal V. Bolam of a choice hop. This will be found on page 607 of the printed

opinion. The first question there propounded to that witness was, "Can you tell the jury what constitutes a choice or first quality hop?" The answer was "Yes"; then by request of counsel the witness proceeded to do so, in part, as follows: "In my judgment what would constitute a choice hop is a hop bright in color, whether green or yellow is immaterial, but the hop should have a brightness and shine; it should be soft in texture as you feel it in your fingers—it should not be of a harsh feeling; it should be rich in lupulin. Lupulin is the pollen contained in the center of the fully matured hop and is its chief ingredient. Another characteristic of the hop, which a great many overlook, is flavor. Choice, prime and medium, in my opinion, depends wholly upon the flavor of the hop. But the two things generally follow one another. In other words, in my humble judgment, the real expert of a hop can tell by the look practically what its other constituents are. It will have that rich, velvety look, which I would roughly explain is the choice hop." At the conclusion of that statement of evidence on page 608 of the opinion, that witness graded the hops in question as "*medium*." Now at the conclusion of the statement of the evidence of the chemist, Bert Pilkington, at the bottom of page 610 of the opinion, that witness was asked, "What do you say about the hops you examined for Edmunson as to their grading?" and the witness answered, "They are above the average we have examined." This in

effect was an attempt to grade the hops as to quality generally, by the chemical analysis made by the witness. It is to that feature of the testimony, that the Court in that opinion, objected. But in the trial of this case we limited the testimony of that witness to proof of the soundness or amount of resin in the hop, only, and therefore we did not ask of this witness his opinion as to the grade of the hops, based on his chemical analysis. But the fundamental error in the trial of that case, as we have suggested, was committed by the plaintiff.

The character of the hops to be produced and delivered by the defendants is specifically stated in the contract as follows: "The said hops covered by this instrument shall be of first quality, i. e., of sound condition, good and even color, fully matured, but not over-ripe, flakey, cleanly picked, properly dried and cured, and free from sweepings and other foreign matter, and not affected by spraying or vermin damage, said hops shall not be of the product of a first year's planting." Now, this contract does not, in terms, mention a choice hop, prime hop or medium hop, as used in the hop trade. Hence there was no room for plaintiff to inquire, as he did, what constitutes a choice hop or a first quality hop, assuming by the question that they were the same, and then when a false standard for comparison has been set up, have the witness give his opinion as to the grade of the hops in question, in terms not fixed by the contract. If it was competent for plaintiff

thus to establish the grade of the hops, it was certainly competent and material to establish their grade by chemical analysis. The particular qualities of the hops bought and sold are expressed in the contract. It is for the Court to construe the contract. The first quality mentioned therein is that "of sound condition" and the second, "good and even color." A designation of an article to be sold as "good" or "sound" means in law, that it shall be of medium quality, according to the custom of the trade, and suitable for the purpose for which it was intended. "Good" does not imply an absolute quality, but only that the article shall be good of its kind, 35 Cyc. 218; and so the Court instructed the jury in this case, as follows: "Good color or sound condition does not mean that the color shall be the best possible color, or that sound condition means the best possible condition, but such designations mean only they shall be of merchantable quality according to the custom of the hop trade, and that the hops in those respects shall be suitable for the purpose for which they were intended." (Page 250, Record.)

Now, in the definition of a choice hop, witness Hal V. Bolam described it as, "Bright in color, whether green or yellow is immaterial, but the hop should have a brightness in shine; it should be soft in texture as you feel it in your fingers—it should not be of a harsh feeling; * * * It should have that rich, velvety look which I would roughly explain

is the choice hop." There are no such designations in the contract as to color or feeling. Again, he testified, "It should be rich in lupulin"; while the contract requires only that the hop shall be "fully matured." And further on, the same witness says in his definition: "Choice, prime or medium, in my opinion, depends wholly upon the flavor of the hop." But flavor is not specified or mentioned at all among the qualities of the hop described in the contract. So then the effort of plaintiff in this case to test the quality of the hops in question solely by the standard used by hop men in judging hops, violates not only the principles of the law of evidence, but the terms of the contract itself. The Trial Court, in admitting the testimony of the chemist, qualified and limited the inquiry to the amount of resin or pollen in the hop by this language: "There has been testimony here coming from the witnesses produced by the plaintiff touching the amount of resin or pollen, as it has been described, or the lupulin that is contained in these hops, some saying that it had more and some less, and that seems to be the prime quality of the hops. If this witness is competent to testify concerning the quantum of the lupulin in the hops, or specimens examined, I think that would be proper to go to the jury." (Page 28, printed record.)

The fifth assignment of error is based upon the same contention as the fourth assignment of error, and the answer made by us to the former will be

sufficient as to the latter.

The sixth, seventh and eighth assignments of error practically are the same. The objection is to the witness testifying as to the result of his chemical analysis of a number of samples of hops received by him from dealers in hops in this and other states, and marked "fancy," "choice," "prime" or "medium." The witness had been asked by the Court if he knew what a choice hop is, that is, choice hop measured by the commercial rule; and the witness answered that he did not, and based on this answer the Court first excluded this proffered testimony. Later on, and after an intermission in the court proceedings, the Court reversed this ruling and permitted the witness to testify. The objection of plaintiff in error seems to be based on this contention, that the contract involved herein calls for the delivery of "choice hops as defined by his witnesses, and, as the witness had testified that he was not able to pick out a choice hop as known in the commercial trade, it would not be competent for him to testify as to the amount of resin or lupulin in samples of hops furnished to him by third parties and marked as choice. When this objection had been stated to the Court, the Court ruled that unless he knows the percentage that exists in the commercial hop of the different qualities, it doesn't seem that he would be competent to testify. "If you can show," the Court said, "by this witness that he is acquainted with commercial hops, and the amount

of resin, for instance, in a prime hop, or a choice hop, or a medium hop, then his testimony would be competent on that point." (Pages 190-191 of printed record.) Then this witness was asked this question: "I will ask you, professor, if you made chemical analysis, at the time you examined this particular sample or prior thereto, of samples of commercial hops, to ascertain the amount of resin therein?" The answer was, "Yes, sir." The witness explained that he had received the samples analyzed by him from different hop dealers in this state, naming, among others, T. A. Livesly, Mr. Seavey, who was a witness for plaintiff in this case as an experienced hop man, and Mr. Horst, of California; following which he testified that the samples examined by him represented commercial hops. The purpose of this proffered testimony was not, as the Trial Court and counsel seemed to think, to establish, by comparison with other hops, that the hops in question were choice hops, or prime hops, but to show that they possessed sufficient lupulin or resin to make them a commercial hop in the market, that is were they within the terms of the contract, a fully matured hop. To make this comparison all that was necessary to be shown by the witness was that the samples with which the comparison was made were of commercial grade, and this the witness testified to as of his own knowledge. The fact that these samples came from reputable hop dealers, for the purpose of having an analysis of the lupulin or resin

made is sufficient, in our judgment, to admit this evidence. The form in which counsel for plaintiff in error has stated his eighth assignment of error, shows the fundamental error into which they have fallen in the trial of this case. Counsel moved to strike out all of the testimony by this chemist, "As assuming that a hop that contains eighteen per cent and a fraction, whatever it is, is a choice hop, or a hop that is a first quality hop under this contract." Here, counsel assume that the hops described in the contract must be a choice hop. We have already shown the error of that contention, but the objection goes only to the weight of the testimony and not to the quality of it.

However, if there were error in admitting any of this testimony it was cured by the Court when instructing the jury as follows: "I will state further, in this connection, gentlemen of the jury, that these hops were raised for the market, and the contract was made with the market value in view, and, in considering the quality of these hops, you will consider them as merchantable, as the parties themselves desired that the hops should be sold in the market and should be so treated, so that the merchantable value is the thing you are to consider, and not strictly speaking, the real inherent or *chemical* value." (Page 250, Record.)

The ninth assignment of error is based on the denial of plaintiff's motion for a new trial. The rule is laid down by a great number of decisions by

the United States Supreme Court and by the Circuit Courts of Appeal, without qualification, that no error can be assigned on the action of the Trial Court in granting or in refusing a new trial. *Wheeler vs. U. S.*, 159 U. S. 523; *Blitz vs. U. S.*, 153 U. S. 308; *Holder vs. U. S.*, 150 U. S. 91; *Moore vs. U. S.*, 150 U. S. 57; *New York, etc., R. Co. vs. Winter*, 143 U. S. 60-75. See also 4 *Corpus Juris*, 831 note (e) where many other cases may be found.

Counsel cite: *McNicol vs. New York Life Ins. Co.*, 149 Fed. 141 as supporting the contention that error may be assigned when it appears that the Trial Court abused its discretion. That case contains no ruling whatsoever on that point. Doubtless, counsel intended to cite the case of *Jones vs. Evans*, 149 Fed. 136. The excerpt quoted therefrom in the brief will be found on page 141. An examination of that case discloses that the ruling was not based on the state of the evidence, but was an allowance of a new trial by the lower Court, which erroneously held that the verdict in favor of one and against another of two alleged joint tort feasons could not stand, but that the verdict must be for or against both defendants. This ruling really amounted to an erroneous ruling on a question of law and not on a question of fact. The reason for the rule that the refusal to set aside a verdict upon the grounds stated will not be reviewed is based on the theory that the mode adopted is not the proper one to secure the relief desired; that a party can not be per-

mitted to speculate upon the probabilities of a favorable verdict, and if disappointed, move to set it aside; and that having had, but, neglected, the opportunity to move for a judgment of nonsuit, or to request an instruction in his favor, in consequence of insufficiency of evidence, he can not, after verdict, be permitted to set it aside for any known reason that he could have urged during trial. *Ruckman vs. Ormond*, 42 Ore. 209-212. If the Court should consider it within its power to consider, at all, this assignment, certainly the presumption must be that the Trial Court properly exercised its discretion, and the burden is upon plaintiff in error to make out a *clear* case of abuse of discretion.

Counsel do not discuss in their brief the evidence in detail, but assume that the burden is upon the defendants.

The dominant fact met in this case at the outset, is that plaintiff's company had contracted to purchase 30,000 pounds of hops and to pay therefor 25 cents per pound, but, at the time delivery was to be made, hops were bringing in the open market no more than 16 to 20 cents per pound. The defendants raised, bailed and tendered to plaintiff's company at the place and time designated in the contract 215 bales which, according to the evidence, would weigh something over 40,000 pounds. The purchasers had a very strong motive to reject these hops if they could conjure up a plausible excuse. They did not deal fairly with defendants in making a

prompt examination and decision as to their attitude. On October 3rd they appeared at Goshen to inspect these hops, tested only two bales and went away, but indicated that they would reject the hops. The agent, Hinkle, on reporting to his principal was ordered back to inspect. He went back that evening, but again delayed, and did not return until the 31st of October, the day after the time for inspection had passed. Then the hops were finally rejected. Now, in inspecting these and in judging of their quality, the evidence will disclose that all of these so-called experts had fixed in their minds a false standard, one not imposed by the contract, by which to judge them. Each of these experts concluded in his own mind that defendants had contracted to furnish what is known in the hop trade as a "choice" hop. They all required a fine, bright, silky, lustrous color, but the contract specified only a "good and even color." They admitted on cross-examination that the only difference they were able to make between a "choice" hop and the next grade below, a "prime," was a slight difference in the degree of luster or brightness of each of them. And one witness, Hal V. Bolam, said that even a medium hop must have a good and even color, too, (page 66, Record). Harry L. Hart testified, "The color was not the very brightest, was not even in color; there was a certain amount of mottled color, what we call mottled or unevenness of color, and a trace of mold. They didn't grade the highest quality as a result

of the fact that they were *not perfect in color* and the other requirements which go to make a *top grade* of hop," (page 68, Record). "They were not a good color compared to a choice hop, when they might have been considered a very fair color compared with a common hop, which is still a lower grade. It is all by comparison you see," (pages 71-72, Record). Hinkle admitted that 104 bales, which would amount to a little over 20,000 pounds, might have been graded as prime, (page 51, Record). Under the extreme test imposed by all these experts, prime hops would have met the terms of this as legally construed, Hinkle admitted that he had stated to Edmunson when inspecting, that if these would come to prime he would accept them, (page 56, Record). So then, from plaintiff alone we have evidence from which the jury could have found that at least 20,000 pounds of the hops were within the contract. Edmunson testified, (page 145, Record), that he had over 20,000 pounds of hops of choice quality and that the rest of the hops would grade prime, with the exception of what they call the ripe end. That was seven or eight bales that they call over-ripe. On cross-examination he testified that the remainder of the hops had a little mold in them, but not enough to affect the quality, (page 156, Record). A little mold in a hop does not necessarily affect the quality of a hop, even a choice hop may have a little mold, (page 171, Record). And J. W. Seavey, witness for plaintiff, corroborated

Edmunson on that point, (page 232, Record). Bolam admitted on cross-examination that there was not a very great amount of mold in them, (page 63, Record), and Hart said there was a trace of mold. (page 68, Record). Heyer said there was not enough mold in the best lot to speak of, just a sprinkling of mold, (page 211, Record), and there were 20,000 to 25,000 pounds of that class.

In fact, the question is not whether the hops had any mold in them for the contract does not exclude mold, but specifies freedom from vermin damage. Bolam admitted on cross-examination that there was not a very great amount of mold in the hop, (page 63, Record).

Flavor as a necessary quality of the choice hop was exploited by plaintiff's experts, but the contract does not mention or require any particular flavor.

Maturity of the hop is a requisite, and many of plaintiff's witnesses concluded because the hops were of a greenish color, they were immature. But Bolam said, whether a hop was green or yellow was immaterial, page 64, Record). Hart said that the hops in question were greenish to greenish-yellow, but could not say that they were immature, (page 70, Record). Ross H. Wood thought that a choice hop could not be of a greenish color, (page 125, Record). Edmunson said that a choice hop could be any color so long as it has a rich flavor, and rich lupulin in it, (page 169, Record). That the hops

in question were all of one color and were fully matured, (page 156, Record).

From the foregoing excerpts from the testimony, it is certainly plain that there is ample testimony to support the verdict of the jury. The weight of the testimony was certainly for the jury and they had a right, if they saw fit, to disbelieve altogether the testimony of plaintiff's expert witnesses and accept only that of the defendant, Edmunson.

The nature of the testimony usually employed by hop men in the trial of these cases is such, that it is not considered by Courts of a very satisfactory or reliable kind. If the highest Courts discount such testimony, how can a jury be criticised for doing the same?

The case of Daniels vs. Morris, 65 Ore. 289-295, was one where the Court had to pass on the quality and weight of the evidence, and in doing so, said:

"The contract calls for hops of prime quality, even color, cleanly picked, and not broken. Plaintiff Daniels and other witnesses called by plaintiffs, in describing or defining hops of prime quality, says it is a hop that is cured properly, picked cleanly, dried enough so as to keep, and not over-dried. They describe choice hops in practically the same terms, and, in distinguishing between prime hops and choice, they were not able to name any differential feature; but we understand from their efforts to describe them that choice hops are hops a little cleaner picked, a little better dried, with-

out being too much dried, and of a little better color than prime hops. In other words, it depends upon the opinion of the person judging, rather than on any accurately definable conditions. If hops are fairly well dried, fairly cleanly picked, and of good color, one expert can consistently pronounce them prime, while another may pronounce them less than prime; and so, also, as to choice hops. Opinions differ. If a buyer is under contract to buy prime hops and wishes to avoid his contract, it is not difficult to claim the hops as less than prime and to get his friends to agree with him. If he wants the hops, he will accept them if they are approximately prime, without objection. So there is no exact line of demarcation between medium and prime hops that can be accurately defined or drawn. The outcome of these hop contracts between the hop buyers and farmers, as to either the buyer or the farmer, is almost a pure chance. There is an absence of all the means of calculating the results. The demand and price for hops are subject to sudden and extreme fluctuation without apparent reason; and, when a person makes such a contract, he cannot expect the courts to show him leniency because of its hardships when the price is adverse to him. Both parties take the chance, and should abide by the result."

We respectfully submit that no reversible error is in the record of this case, and the judgment ought to be affirmed.

MANNING, SLATER & LEONARD,

Attorneys for Defendants in Error.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MENASHA WOODEN WARE COMPANY, a corporation
PLAINTIFF IN ERROR

vs.

**SOUTHERN OREGON COMPANY, a corporation; COOS
COUNTY; ROBERT R. WATSON, County Clerk of Coos
County; A. JOHNSON, Jr., Sheriff of Coos County, and
T. M. DIMMICK, Treasurer of Coos County, Oregon; and
the FIRST NATIONAL BANK OF COOS BAY**
DEFENDANTS IN ERROR

TRANSCRIPT OF RECORD

**Upon Writ of Error to the District Court of the United
States, for the District of Oregon**

Filed

AUG 28 1916

F. D. Monckton,
Clerk.



No.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MENASHA WOODEN WARE COMPANY, a corporation
PLAINTIFF IN ERROR

vs.

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County; A. JOHNSON, Jr., Sheriff of Coos County, and
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Menasha Wooden Ware Co.

No.....

*United States Circuit Court of Appeals
for the Ninth Circuit.*

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Plaintiff in Error,

vs.

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Coos County; A. JOHNSON, JR., Sheriff of Coos
County; and T. M. DIMMICK, Treasurer of Coos
County, Oregon, and the FIRST NATIONAL BANK
OF COOS BAY,

Defendants in Error.

NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD:

Dolph, Mallory, Simon & Gearin,
Mohawk Building, Portland, Oregon,
for the Plaintiff in Error.

Lawrence A. Liljeqvist, Marshfield, Oregon,
for Coos County; Robert R. Watson, County Clerk
of Coos County; A. Johnson, Jr., Sheriff of Coos
County; and T. M. Dimmick, Treasurer of Coos
County, Oregon, Defendants in Error.

W. U. Douglas, Marshfield, Oregon,
for the First National Bank of Coos Bay,
Defendant in Error.

CITATION ON WRIT OF ERROR.

United States of America, District of Oregon, ss.

TO SOUTHERN OREGON COMPANY, A CORPORATION;
COOS COUNTY; ROBERT R. WATSON, COUNTY
CLERK OF COOS COUNTY; A. JOHNSON, JR.,
SHERIFF OF COOS COUNTY; T. M. DIMMICK, TREAS-
URER OF COOS COUNTY, OREGON, AND THE FIRST
NATIONAL BANK OF COOS BAY, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Manasha Wooden Ware Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said district, this fifth day of July, in the year of our Lord, one thousand, nine hundred and sixteen.

R. S. BEAN,
Judge.

Due service of the foregoing Citation on Writ of Error admitted this 12th day of July, A. D. 1916.

L. A. LILJEQVIST,
District Attorney.

By R. O. GRAVES,
Deputy.

Attorneys for Coos County, Robert R. Watson,
County Clerk, A. Johnson, Jr., Sheriff, and T. M.
Dimmick, County Treasurer of Coos County,
Oregon.

W. U. DOUGLAS,

Attorney for First National Bank of Coos Bay.
Filed July 14, 1916.

G. H. MARSH,
Clerk.

*In the United States Circuit Court of Appeals
for the Ninth Circuit.*

WRIT OF ERROR.

MENASHA WOODEN WARE COMPANY, a cor-
poration,

Plaintiff in Error,

vs.

SOUTHERN OREGON COMPANY, a corporation;
COOS COUNTY; ROBERT R. WATSON, Coun-
ty Clerk of Coos County; A. JOHNSON, Jr.,
Sheriff of Coos County; T. M. DIMMICK, Treas-
urer of Coos County, Oregon, and the FIRST
NATIONAL BANK OF COOS BAY,

Defendants in Error.

The United States of America, ss.

THE PRESIDENT OF THE UNITED STATES
OF AMERICA.

TO THE JUDGE OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF OREGON,
GREETING:

Because in the records and proceedings, as also

in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between Menasha Wooden Ware Company, a corporation, plaintiff and plaintiff in error, and Southern Oregon Company, a corporation; Coos County, Robert R. Watson, County Clerk of Coos County; A. Johnson, Jr., Sheriff of Coos County; T. M. Dimmick, Treasurer of Coos County, Oregon, and the First National Bank of Coos Bay, defendants and defendants in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the HONORABLE EDWARD DOUGLAS
WHITE, Chief Justice of the Supreme Court
of the United States, this 5th day of July, 1916.

[SEAL]

G. H. MARSH,

Clerk of the District Court of the United
States for the District of Oregon.

By F. L. BUCK,

Deputy.

Service of the above Writ of Error made this
5th day of July, 1916, upon the District Court of
the United States for the District of Oregon, by
filing with me as Clerk of said Court, a duly certi-
fied copy of said Writ of Error.

G. H. MARSH,

Clerk of the District Court of the United
States for the District of Oregon.

By F. L. BUCK,

Deputy.

Filed July 5, 1916.

G. H. MARSH,

Clerk, United States District Court,
District of Oregon.

*In the District Court of the United States for the
District of Oregon.*

November Term, 1915.

Be it Remembered, That on the 25th day of Jan-
uary, 1916, there was duly filed in the District
Court of the United States for the District of
Oregon, a complaint, and thereafter there was
duly filed in said Court demurrers to the said

Complaint, and thereafter, after a hearing duly had, the Court on March 20, 1916, sustained the said demurrers, and thereafter, on April 17, 1916, there was duly filed in said Court an Amended Complaint, in words and figures as follows, to wit:

AMENDED COMPLAINT.

*In the District Court of the United States for the
District of Oregon.*

MENASHA WOODEN WARE COMPANY, a corporation,

Plaintiff,

vs.

SOUTHERN OREGON COMPANY, a corporation;
COOS COUNTY; ROBERT R. WATSON, County Clerk of Coos County; A. JOHNSON, Jr., Sheriff of Coos County, and T. M. DIMMICK, Treasurer of Coos County, Oregon, and the
FIRST NATIONAL BANK OF COOS BAY,

Defendants.

Plaintiff complaining of defendants, by this its Amended and Supplemental Complaint by leave of Court filed, for cause of action alleges:

I.

That the plaintiff is and during all the times herein mentioned has been, a corporation duly organized and existing under the laws of the State of Wisconsin, and is a citizen and resident of the State of Wisconsin, and qualified to do business in the State of Oregon.

II.

That the defendant Southern Oregon Company is and during all the times herein mentioned has been, a corporation, organized and existing under and by virtue of the laws of the State of Oregon, and is a citizen and resident of the said State.

III.

That the defendant Coos County is a political division of the State of Oregon, is a body politic and corporate, and one of the counties of the State of Oregon; that the defendant Robert R. Watson is the County Clerk and defendant T. M. Dimmick is the County Treasurer of said Coos County, Oregon. That during the year 1912 one W. W. Gage was, and the defendant A. Johnson, Jr., now is, the Sheriff and Tax Collector of said Coos County, Oregon, and all of said defendants are and during all the times herein mentioned have been citizens and residents of the State of Oregon.

IV.

That the defendant the First National Bank of Coos Bay is a National banking corporation, duly created and chartered under the National Bank Act, and is a citizen and resident of the State of Oregon.

V.

That the amount involved in this suit, exclusive of costs, exceeds the sum of \$3000.00.

VI.

That on the 2nd day of July, 1912, the defendant Southern Oregon Company claiming to own cer-

tain lands in Coos County, Oregon, filed its certain Bill of Complaint in the Circuit Court of the State of Oregon for Coos County, against W. W. Gage as Sheriff and Tax Collector of the said Coos County, Oregon, in and by which Bill of Complaint the said Southern Oregon Company alleged that the said W. W. Gage as Sheriff and Tax Collector of Coos County was about to advertise and sell said lands for delinquent taxes.

And in and by said Bill of Complaint it was further alleged that on the 3rd day of March, 1869, the Congress of the United States passed an Act granting to the State of Oregon said lands to aid in the construction of a wagon road from the navigable waters of Coos Bay to Roseburg in the State of Oregon. That on October 22nd, 1870, the Legislative Assembly of the State of Oregon transferred said grant and the lands included therein to the Coos Bay Wagon Road Company. That the Southern Oregon Company was the successor in interest of the Coos Bay Wagon Road Company and succeeded to the title of said company in said lands.

And it was further alleged in said Complaint that the said Southern Oregon Company was in possession of and claimed to own all said lands in Coos County, which lands were particularly described in said Bill of Complaint and that the title to all said lands appeared of record to be in said Southern Oregon Company. And it was further alleged in said Complaint that the United States of America had brought suit, which suit was then

pending, against the said Southern Oregon Company, to forfeit the title to all said lands and revest the same in the Government. And it was further alleged in said Complaint that all of said lands appeared on the tax rolls of Coos County, Oregon, for the years 1909, 1910, 1911 and 1912 assessed to said Southern Oregon Company and the taxes for said years had not been paid and were delinquent, and that because of said suit the said Southern Oregon Company could not safely pay said taxes.

And it was further alleged in said Bill that by virtue of the provisions of Sections 3693 and 3694, Lord's Oregon Laws, the said W. W. Gage, as Sheriff and Tax Collector of Coos County, Oregon, was about to advertise all said lands for sale for delinquent taxes and was about to issue tax delinquency certificates against all said property which certificates might be foreclosed as provided by Section 3695, Lord's Oregon Laws, and such title as said Southern Oregon Company had in said property would be sold; and said Southern Oregon Company had no plain, speedy or adequate remedy at law in the premises.

VII.

That due service of Summons and Complaint was had in said suit upon the defendant and appearance was duly entered by said defendant.

That on the 3rd day of July, 1912, the said Circuit Court of the State of Oregon for Coos County, then having jurisdiction over the parties and the subject matter of said suit and all parties in said

suit being before the Court, duly made and entered an Order restraining the defendant W. W. Gage as prayed for in said suit, which Order was and is in words as follows, to wit:

“This matter now coming on to be heard, the Court having read the Complaint herein and being fully advised in the premises and the Court being satisfied that this is a proper case for the issuance of a temporary order of injunction,

It is hereby ordered that upon the payment to the Clerk of this Court by the plaintiff, the amount of money shown by the tax rolls of Coos County, Oregon, to be due from the plaintiff as taxes upon the lands assessed to the plaintiff as owners, the defendant W. W. Gage as Tax Collector for said county shall also deliver to the Clerk of this Court proper tax receipts for such taxes, and the said Clerk shall hold and retain said money and tax receipts until the final determination of the case of the United States of America v. Southern Oregon Company now pending in the Circuit Court of the United States for the District of Oregon, Ninth Judicial Circuit, in whatever court said case may be finally determined; and upon such final determination if the real estate described in the Complaint shall be held to be the property of the United States then said money so deposited to the Clerk shall be returned to the plaintiff, but if it be therein decided that said

real estate does not belong to the United States then said money shall be paid over to the defendant herein; unless it shall meanwhile otherwise be ordered by this Court.

It is further ordered that the defendant W. W. Gage, as Sheriff and Tax Collector of said county, do hereafter refrain from advertising any of said land or any part thereof for sale for the payment of delinquent taxes, and that he do refrain from issuing any tax delinquency certificates against any of said land until the further order of this Court or a Judge thereof."

VIII.

That the defendant W. W. Gage filed a demurrer to said Bill of Complaint, and on the 3rd day of July, 1914, the Court sustained said demurrer and made and entered the following Order, to wit:

"Comes now to be heard the demurrer of the defendant to the complaint and demurrer of defendant to the supplemental complaint and the plaintiff appearing by A. S. Hammond, one of its attorneys, and the defendant appearing by L. A. Liljequist, District Attorney, his attorney, and the Court having considered said demurrer and each of them, and being advised in the premises,

It is considered, ordered and adjudged that said demurrers and each of them be sustained.

And the plaintiff stating in open Court that it would stand upon its Complaint and Supple-

mental Complaint and did not desire to amend or plead further,

It is considered, ordered, adjudged and decreed that plaintiff's suit be and the same is hereby dismissed and all restraining orders heretofore entered be and the same are hereby vacated and the temporary injunction issued herein is hereby set aside and said orders revoked, and it is further decreed that defendant have and recover his costs and disbursements issued herein and that execution issue therefor."

IX.

That the Southern Oregon Company duly appealed from the said judgment of the Circuit Court of the State of Oregon for Coos County, to the Supreme Court of the State of Oregon, and said Supreme Court on the 13th day of April, 1915, affirmed said judgment of the Circuit Court of the State of Oregon for said Coos County, and directed its mandate to be sent to the Circuit Court of the State of Oregon for Coos County. That thereupon the mandate of the Supreme Court of the State of Oregon in said case was sent to the Circuit Court of the State of Oregon for Coos County and was duly entered of record in said Court on the 22nd day of May, A. D. 1915.

X.

This plaintiff further alleges that on the 30th day of November, 1915, the defendant A. Johnson, Jr., as Sheriff and Tax Collector of Coos County, Oregon, issued to Coos County Certificates of De-

linquency for the delinquent taxes for 1909 of all said property except six small pieces upon which certificates were issued to private parties in accordance with the provisions of Section 3698, Lord's Oregon Laws, and the said defendant Coos County on the 29th day of March, 1916, filed its Complaint in the Circuit Court of the State of Oregon for Coos County against the defendant Southern Oregon Company to foreclose all said Certificates of Delinquency and to sell all said lands to satisfy the same.

XI.

And this plaintiff further alleges that at the request of defendant Southern Oregon Company, and on August 22nd, 1912, this plaintiff drew its check on the Wisconsin National Bank of Milwaukee, Wisconsin, in favor of the County Clerk of Coos County, Oregon, for \$75,000.00, and delivered the same to the defendant Southern Oregon Company to be used by said Southern Oregon Company in complying with the terms of said order of Court. That said Southern Oregon Company on the 29th day of August, 1912, delivered said check to James Watson, who was then the County Clerk of said defendant Coos County, Oregon, and said James Watson, without, however, having authority so to do, endorsed and assigned said check to T. M. Dimmick, who was then County Treasurer of defendant Coos County. That said defendant T. M. Dimmick, as County Treasurer, but without having any authority so to do, endorsed and assigned said check to the de-

fendant First National Bank of Coos Bay, and said defendant First National Bank of Coos Bay collected the same on July 19, 1913, and received thereon through the Corn Exchange National Bank of Chicago, Illinois, the full sum of \$75,000.00, which said sum was received by said First National Bank of Coos Bay to the use and benefit of this plaintiff.

And this plaintiff alleges that said sum of \$75,000.00 and the whole thereof has remained intact in the possession of said First National Bank of Coos Bay from the said 19th day of July, 1913, down to the present time. That plaintiff is informed, however, and believes that defendant First National Bank of Coos Bay has, but without any authority from this plaintiff or said Southern Oregon Company, or at all, credited said sum of \$75,000.00 on its books to the defendant T. M. Dimmick on his account with said bank as County Treasurer, and said T. M. Dimmick claims to have some interest in said \$75,000.00. And plaintiff alleges that said claim of the defendant T. M. Dimmick is entirely unfounded, and that said \$75,000.00 and the whole thereof is the property of this plaintiff and plaintiff is entitled to recover the same from the defendant First National Bank of Coos Bay.

XII.

And this plaintiff further alleges that at the request of the defendant Southern Oregon Company, and on the 18th day of March, 1915, this plaintiff issued its check on the First National Bank of Menasha, Wisconsin, for \$18,309.17, payable to

the "Clerk of the Court of Coos County, Oregon," Robert R. Watson, defendant above named, and delivered the same to the defendant Southern Oregon Company, to be used by said Southern Oregon Company in complying with said order of Court. That said Southern Oregon Company delivered said check to Robert R. Watson, defendant. That said Robert R. Watson endorsed and assigned said check to T. M. Dimmick, County Treasurer, and the said T. M. Dimmick, County Treasurer, assigned the same to the First National Bank of Coos Bay, defendant above named, and that said First National Bank of Coos Bay, defendant above named, collected the same and received thereon through the Corn Exchange National Bank of Chicago, Illinois, on the 24th day of July, 1915, the full sum of \$18,309.07, which sum was received by said First National Bank of Coos Bay to the use and benefit of this plaintiff.

And this plaintiff alleges that said sum of \$18,309.07 and the whole thereof has remained intact in the possession of said First National Bank of Coos Bay from said 24th day of July, 1915. That plaintiff is informed, however, and believes that the defendant First National Bank of Coos Bay has, but without any authority from this plaintiff or said Southern Oregon Company, or at all, so to do, credited said sum of \$18,309.07 on its books to the defendant T. M. Dimmick on his account with said bank as County Treasurer, and said defendant T. M. Dimmick claims to have some interest in said \$18,-

309.07. And plaintiff alleges that said claim of the defendant T. M. Dimmick is entirely unfounded, and that said sum of \$18,309.07 and the whole thereof is the property of this plaintiff and plaintiff is entitled to recover the same.

XIII.

And plaintiff further alleges that neither the said W. W. Gage, as Tax Collector of said Coos County, Oregon, nor said A. Johnson, Jr., as Tax Collector of said Coos County, Oregon, ever delivered to the Clerk of said Coos County, Oregon, proper, or any, tax receipt or receipts, for such or any taxes referred to in the Complaint in said suit of the Southern Oregon Company vs. W. W. Gage, as above set out.

XIV.

And this plaintiff further alleges that long prior to November 10, 1915, the defendant Southern Oregon Company duly assigned to this plaintiff whatever interest it might be said to have in said sums of money, or any of them, and duly authorized this plaintiff to apply to said First National Bank of Coos Bay, or to any person having possession of said moneys, or any of them, and to demand the return of the same and repayment thereof to this plaintiff. And this plaintiff says that on or about the 10th day of November, 1915, this plaintiff duly notified the First National Bank of Coos Bay and said Robert R. Watson, County Clerk, and said T. M. Dimmick, County Treasurer, of said assignment and authorization and of the fact that all

said moneys had been advanced by this plaintiff as above set out, and both this plaintiff and the defendant Southern Oregon Company duly notified said First National Bank of Coos Bay and said Robert R. Watson and said T. M. Dimmick of all the facts herein pleaded. That on or about the 10th day of November, 1915, after having given said notice to said First National Bank of Coos Bay and said Robert R. Watson and said T. M. Dimmick of all the facts herein pleaded, this plaintiff and the defendant Southern Oregon Company demanded of said First National Bank of Coos Bay and said Robert R. Watson and said T. M. Dimmick the payment and return to this plaintiff of all said moneys. And plaintiff alleges that said First National Bank of Coos Bay and said Robert R. Watson and said T. M. Dimmick refused and still refuse to deliver to this plaintiff said sum of \$75,000.00, or said sum of \$18,309.07, or any part of either of said sums, and that the whole thereof remains due and payable to this plaintiff from said First National Bank of Coos Bay.

Wherefore, plaintiff prays judgment against said First National Bank of Coos Bay, Robert R. Watson and T. M. Dimmick for said sum of \$75,000.00 and said sum of \$18,309.07, in all the sum of \$93,309.07, and interest thereon at the rate of six per cent per annum from the 10th day of November, 1915, and for the costs and disbursements of this action.

DOLPH, MALLORY, SIMON & GEARIN,

Attorneys for Plaintiff.

STATE OF OREGON, }
County of Coos. } ss.

I, Herbert Armstrong, being first duly sworn, depose and say that I am the agent of the plaintiff in the above entitled suit; and that the foregoing amended and supplemental complaint is true as I verily believe.

HERBERT ARMSTRONG.

Subscribed and sworn to before me this 15th day of April, A. D. 1916.

[SEAL]

ANNIE SMITH,

Notary Public for the State of Oregon.

My commission expires Feb. 26, '17.

STATE OF OREGON, }
County of..... } ss.

Due and legal service of the within amended and supplemental complaint is hereby accepted in County, Oregon, this 15th day of April, 1916, by receiving a true copy thereof, duly certified to as such by Jno. M. Gearin, of attorney for plaintiff.

L. A. LILJEQVIST,

Attorney for defendant Coos County, County

Clerk, County Treasurer and Sheriff.

W. U. DOUGLAS,

Attorney for First National Bank of Coos Bay.

Filed April 17, 1916.

G. H. MARSH,

Clerk.

And afterwards, to wit, on the 22nd day of April, 1916, there was duly filed in said Court and cause, a Motion of the defendant First National Bank of Coos Bay, to strike out the Amended Complaint, in words and figures as follows, to wit:

**MOTION OF FIRST NATIONAL BANK OF
COOS BAY TO STRIKE OUT.**

Now comes the defendant First National Bank of Coos Bay and, for itself alone, moves the Court to strike from the files in the above entitled action the first amended complaint of the plaintiff herein for the reason that the same is sham, frivolous and irrelevant, in that it is substantially a repetition of the plaintiff's first complaint herein, which said complaint was demurred to by this defendant for the reason that the Court had no jurisdiction of the subject matter of the action, among other causes, and this Court heretofore sustained this defendant's said demurrer on the ground that the Court had no jurisdiction of the subject matter of said action.

W. U. DOUGLAS,
Attorney for Defendant
First National Bank of Coos Bay.

Filed April 22, 1916.

G. H. MARSH,
Clerk.

And afterwards, to wit, on the 24th day of April, 1916, there was duly filed in said Court and cause, a Motion of Coos County and others to

strike out the Amended Complaint, in words and figures as follows, to wit:

MOTION OF COOS COUNTY TO STRIKE OUT.

Now comes Coos County, Robert R. Watson, County Clerk of Coos County, A. Johnson, Jr., Sheriff of Coos County, and T. M. Dimmick, Treasurer of Coos County, appearing for themselves alone and not for their co-defendants jointly and severally, move to strike from plaintiff's Amended and Supplemental Complaint all of subdivision numbered ten therein for the reason that the same is sham, frivolous, and irrelevant.

These defendants further jointly and severally move the Court for an order striking from the files in the above entitled action the Amended and Supplemental Complaint of the plaintiff herein for the reason that the same is sham, frivolous, and irrelevant in that it is substantially a repetition of plaintiff's original complaint filed herein, which said complaint was demurred to by these defendants for the reason that the Court had no jurisdiction of the subject matter of the action, among other causes, and this Court heretofore sustained this defendant's said demurrer on the ground that the Court had no jurisdiction of the subject matter of said action.

LAWRENCE A. LILJEQVIST,

Attorney for Defendants above named.

Filed April 24, 1916.

G. H. MARSH,

Clerk.

And afterwards, to wit, on the 24th day of April, 1916, there was duly filed in said Court and cause, a Demurrer of Coos County and others to the Amended Complaint, in words and figures as follows, to wit:

DEMURRER OF COOS COUNTY AND OTHERS.

Comes now the defendants Coos County, Robert R. Watson, County Clerk of Coos County, A. Johnson, Jr., Sheriff of Coos County, Oregon, and T. M. Dimmick, Treasurer of Coos County, Oregon, and appearing for themselves and not for their co-defendants, jointly and severally demur to the Amended and Supplemental Complaint, and to the whole thereof upon the ground and for the reasons following, that is to say:

I.

It appears from the fact of the Amended and Supplemental Complaint that this Court has no jurisdiction of the subject matter of this action.

II.

It appears from the face of the Amended and Supplemental Complaint that the subject matter of this action is now involved in a certain suit pending in the Circuit Court of the State of Oregon for Coos County, Oregon, wherein Southern Oregon Company, alleged by the Amended and Supplemental Complaint to be the assignor of the plaintiff, is plaintiff; and wherein W. W. Gage, Sheriff and Tax Collector of Coos County, Oregon, and prede-

cessor in office of the defendant A. Johnson, Jr., is defendant.

III.

It appears from the face of the Amended and Supplemental Complaint that the Amended and Supplemental Complaint does not state facts sufficient to constitute a cause of action, and that if the plaintiff has any remedy it is by intervention in the Circuit Court of Coos County, State of Oregon, in the case of Southern Oregon Company, plaintiff, vs. W. W. Gage, Sheriff and Tax Collector, and filing a petition in said cause in the Circuit Court of Coos County, Oregon, praying for and requesting an order directing the payment of the fund paid into said Court and to said County Clerk as alleged in the Amended and Supplemental Complaint and for a distribution of the fund to the person or persons or corporate body entitled thereto.

IV.

It appears from the face of the Amended and Supplemental Complaint that the sums of money the subject matter of this action were deposited in the Circuit Court of the State of Oregon for Coos County, to be retained in said Circuit Court until the final determination of the case of United States of America against the Southern Oregon Company, formerly pending and heretofore determined by this Court, and now pending on appeal in the Circuit Court of Appeals of the United States for the Ninth Judicial Circuit, and that no final determination of said case has been had or made.

V.

That it appears from the face of the Amended and Supplemental Complaint that the moneys therein mentioned are legally due and owing from the Southern Oregon Company as taxes on lands owned by said Southern Oregon Company in Coos County, Oregon; and that said moneys and the whole thereof belong to the defendant Coos County, Oregon, and its officers charged by law with the custody and keeping of tax moneys are entitled to keep and retain the same, and that said defendant Coos County, Oregon, and these demurring defendants are entitled to apply them upon delinquent taxes of said Southern Oregon Company.

VI.

That it appears from the face of the Amended and Supplemental Complaint that the sums of money sought to be recovered, and mentioned in the Amended and Supplemental Complaint are held by or claimed by the defendant T. M. Dimmick, as County Treasurer of Coos County, Oregon, as the moneys of said Coos County; and that Coos County, Robert R. Watson, County Clerk of Coos County, A. Johnson, Jr., Sheriff of Coos County, and T. M. Dimmick, did not nor did their predecessors in office, title or interest at any time take or receive the same from the plaintiff or its assignor for the use of the plaintiff or its assignor.

VII.

It appears from the face of the Amended and Supplemental Complaint that there is a defect of

parties defendant in this, that the Circuit Court of the State of Oregon in and for the County of Coos is not a defendant herein, nor are any of the Judges thereof, to wit, either the Hon. John S. Coke, J. W. Hamilton, or G. F. Skipworth parties defendant herein, and it appears that the money and funds mentioned in said Amended and Supplemental Complaint is now in *custodia legis* and has been deposited with T. M. Dimmick, the County Treasurer herein, pursuant to the order of said Circuit Court.

LAWRENCE A. LILJEQVIST,
Attorney for Defendants Coos County,
Robert R. Watson, County Clerk of Coos
County, A. Johnson, Jr., Sheriff of Coos
County, Oregon, and T. M. Dimmick,
Treasurer of Coos County, Oregon.

I hereby certify that I am an attorney of this Court; that I have read the foregoing demurrer, and that in my opinion the same is well founded in law, and that the same is not filled for delay.

LAWRENCE A. LILJEQVIST.

Filed April 24, 1916.

G. H. MARSH,
Clerk.

And afterwards, to wit, on the 1st day of May, 1916, there was duly filed in said Court and cause, a Demurrer of the First National Bank of Coos Bay to the Amended Complaint, in words and figures as follows, to wit:

DEMURRER OF FIRST NATIONAL BANK OF
COOS BAY.

Comes now the First National Bank of Coos Bay, one of the defendants above named, appearing for itself alone, and not for its co-defendants, and demurs to the complaint of plaintiff herein upon the grounds and for the reasons following, that is to say:

1. It appears from the face of the complaint that this Court has no jurisdiction of the subject matter of this action.

2. That there is a defect of parties defendant therein for the reason that the Circuit Court of the State of Oregon, for Coos County, is not, nor are the judges thereof, nor any of them, to-wit, J. W. Hamilton, John S. Coke, Jr., and G. F. Skipworth, made parties defendant in said complaint; and the complaint on its face shows that the money sought to be recovered from the defendants above named is on deposit with and in the said Circuit Court of the State of Oregon in and for the County of Coos, and is wholly subject to the orders, control and jurisdiction of said Court, and not the control and possession of these defendants or any of them.

3. It appears from the face of the complaint that said complaint does not state facts sufficient to constitute a cause of action.

4. That it appears from the complaint that the sum of money sought to be recovered under plaintiff's complaint is held by this defendant First National Bank of Coos Bay, at Marshfield, as a de-

pository for the defendant T. M. Dimmick, as Treasurer of Coos County, Oregon, subject to the orders, control and jurisdiction of the Circuit Court of the State of Oregon, in and for the County of Coos, and that the defendant at no time took or received the same from the plaintiff or its assignor, nor is now holding the same for the use and benefit of the plaintiff or its assignor.

W. U. DOUGLAS,
Attorney for Defendant
First National Bank of Coos Bay.

Filed May 1, 1916.

G. H. MARSH,
Clerk.

And afterwards, to wit, on Monday, the 15th day of May, 1916, the same being the 61st Judicial day of the regular March, 1916, term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER SUSTAINING DEMURRERS:
JUDGMENT.

Now, at this day, come the plaintiff by Mr. John M. Gearin, of counsel, whereupon this cause comes on to be heard by the Court upon the motion of the defendants to strike out parts of the amended complaint herein, said defendants not appearing; on consideration whereof, it is ordered and adjudged that said motion be, and the same is hereby denied,

and thereupon this cause comes on to be heard upon the several demurrers to said amended complaint; on consideration whereof, it is ordered and adjudged that said demurrers be, and the same are hereby sustained and that the amended complaint herein be, and the same is hereby dismissed, and that said defendants have and recover of and from said plaintiff their costs and disbursements taxed herein at \$.

And afterwards, to wit, on the 5th day of July, 1916, there was duly filed in said Court and cause, a Petition for Writ of Error, in words and figures as follows, to wit:

PETITION FOR WRIT OF ERROR.

Now comes the Menasha Wooden Ware Company, a corporation, plaintiff herein, and says that on or about the 15th day of May, 1916, this Court entered judgment herein in favor of the defendants and against this plaintiff, sustaining the demurrers to this plaintiff's Amended Complaint and dismissing plaintiff's Amended Complaint and directing judgment for the defendants for their costs and disbursements, in which judgment and the proceedings had prior thereunto certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the Assignment of Errors which is filed with this Petition;

Wherefore, this plaintiff prays that a Writ of Error may issue in this behalf to the United States

Circuit Court of Appeals for the Ninth Circuit for the correction of error so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals. And plaintiff, petitioner herein, prays that the judgment rendered in this cause as above described may be reversed, held for naught and that said cause be remanded for further proceedings.

MENASHA WOODEN WARE COMPANY,

Petitioner.

DOLPH, MALLORY, SIMON & GEARIN,

Attorneys for Petitioner.

Filed July 5, 1916.

G. H. MARSH,

Clerk.

And afterwards, to wit, on the 5th day of July, 1916, there was duly filed in said Court and cause, an Assignment of Errors, in words and figures as follows, to wit:

ASSIGNMENT OF ERRORS.

The plaintiff in this action in connection with its Petition for a Writ of Error, makes the following Assignment of Errors, which it avers occurred upon the trial of the cause, to wit:

First. The District Court of the United States for the District of Oregon erred in sustaining the demurrer of the defendants Coos County; Robert R. Watson, Clerk of Coos County; A. Johnson, Jr.,

Sheriff of Coos County, and T. M. Dimmick, Treasurer of Coos County, Oregon, to plaintiff's Amended Complaint.

Second. The said Court erred in sustaining the demurrer of the defendant The First National Bank of Coos Bay, to plaintiff's Amended Complaint.

Third. The said Court erred in not overruling the demurrer of the defendants Coos County; Robert R. Watson, Clerk of Coos County; A. Johnson, Jr., Sheriff of Coos County, and T. M. Dimmick, Treasurer of Coos County, Oregon, to plaintiff's Amended Complaint.

Fourth. The said Court erred in not overruling the demurrer of defendant The First National Bank of Coos Bay to plaintiff's Amended Complaint.

Fifth. The said Court erred in dismissing plaintiff's Amended Complaint.

Sixth. The said Court erred in awarding and entering judgment in favor of the defendants and against this plaintiff for costs and disbursements.

DOLPH, MALLORY, SIMON & GEARIN,
Attorneys for Plaintiff.

Filed July 5, 1916.

G. H. MARSH,
Clerk.

And afterwards, to wit, on Wednesday, the 5th day of July, 1916, the same being the 2nd Judicial day of the regular July, 1916, term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the fol-

lowing proceedings were had in said cause, to wit:

ORDER ALLOWING WRIT OF ERROR.

On this 5th day of July, 1916, came the plaintiff, by its attorneys, and filed herein and presented to the Court, its Petition praying for the allowance of a Writ of Error intended to be urged by it and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the 9th Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the Writ of Error upon the plaintiff giving bond according to law, in the sum of Two Hundred and Fifty Dollars, which shall operate as a supersedeas bond.

R. S. BEAN,
Judge.

Filed July 5, 1916.

G. H. MARSH,
Clerk.

And afterwards, to wit, on the 5th day of July, 1916, there was duly filed in said Court and cause, a Bond on Writ of Error, in words and figures as follows, to wit:

BOND ON WRIT OF ERROR.

Know All Men by These Presents, That the Menasha Wooden Ware Company, a corporation,

as principal, and Maryland Casualty Company, a corporation organized under the laws of the State of Baltimore, and authorized to do business in the State of Oregon, as surety, are held and firmly bound unto the said defendants above named, in the full and just sum of Two Hundred and Fifty Dollars (\$250.00) to be paid to the said defendants, their attorneys, successors and assigns; to which payment well and truly to be made, we bind ourselves and our and each of our, successors and assigns, jointly by these presents. Sealed with our seals and dated this 5th day of July, A. D. 1916; and,

Whereas, lately at a District Court of the United States for the District of Oregon, in a suit pending in said Court between the said plaintiff, and the defendants above named, a judgment was rendered against the said plaintiff, and the said plaintiff having obtained a Writ of Error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the defendants above named citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in said Circuit, on the..... day of.....next.

Now, the condition of the above obligation is such, that if the said plaintiff shall prosecute said Writ of Error to effect and answer all damages and costs if it fail to make the said plea good, then

the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in the presence of:

MENASHA WOODEN WARE COMPANY,
By DOLPH, MALLORY, SIMON & GEARIN.

JNO. M. GEARIN,
Attorney.

[Seal, Maryland Casualty Company.]

MARYLAND CASUALTY COMPANY,
By GEE. S. RODGERS,
Its Attorney.

By J. F. GANNON,
Its Attorney.

Examined and approved this 5th day of July,
1916.

R. S. BEAN,
Judge.

Filed July 5, 1916.

G. H. MARSH,
Clerk.

UNITED STATES OF AMERICA, }
District of Oregon. } ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing Writ of Error, and in obedience thereto, do hereby certify that the foregoing printed transcript of record in the case in which Menasha Wooden Ware Company is plaintiff, and plaintiff in error, and the Southern Oregon Company, The First National Bank of Coos Bay, and others are defendants, and defendants in error, has been prepared by me in accordance with the law and the rules of Court, and in accordance with the direction of the praecipe for transcript filed in said cause by said plaintiff in error, and that the said transcript is a full, true and correct transcript of the record and proceedings had in said Court in said cause designated by the said praecipe to be included herein, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is \$ for printing said record, and that the same has been paid by said plaintiff in error.

In testimony hereof I have hereunto set my hand
and affixed the seal of said
Court at Portland in said
district this day
of August, 1916.

.....
Clerk.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MENASHA WOODEN WARE COMPANY, a corporation
PLAINTIFF IN ERROR

vs.

SOUTHERN OREGON COMPANY, a corporation; COOS
COUNTY; ROBERT R. WATSON, County Clerk of Coos
County; A. JOHNSON, Jr., Sheriff of Coos County, and
T. M. DIMMICK, Treasurer of Coos County, Oregon; and
the FIRST NATIONAL BANK OF COOS BAY
DEFENDANTS IN ERROR

Brief on Behalf of Plaintiff in Error

UPON WRIT OF ERROR
TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON

DOLPH, MALLORY, SIMON & GEARIN,
Mohawk Building, Portland, Oregon,
Attorneys for Plaintiff in Error.

W. U. DOUGLAS,
Attorney for First National Bank of Coos Bay.

L. A. LILJEQVIST,
Attorney for Coos County, et al.

Filed

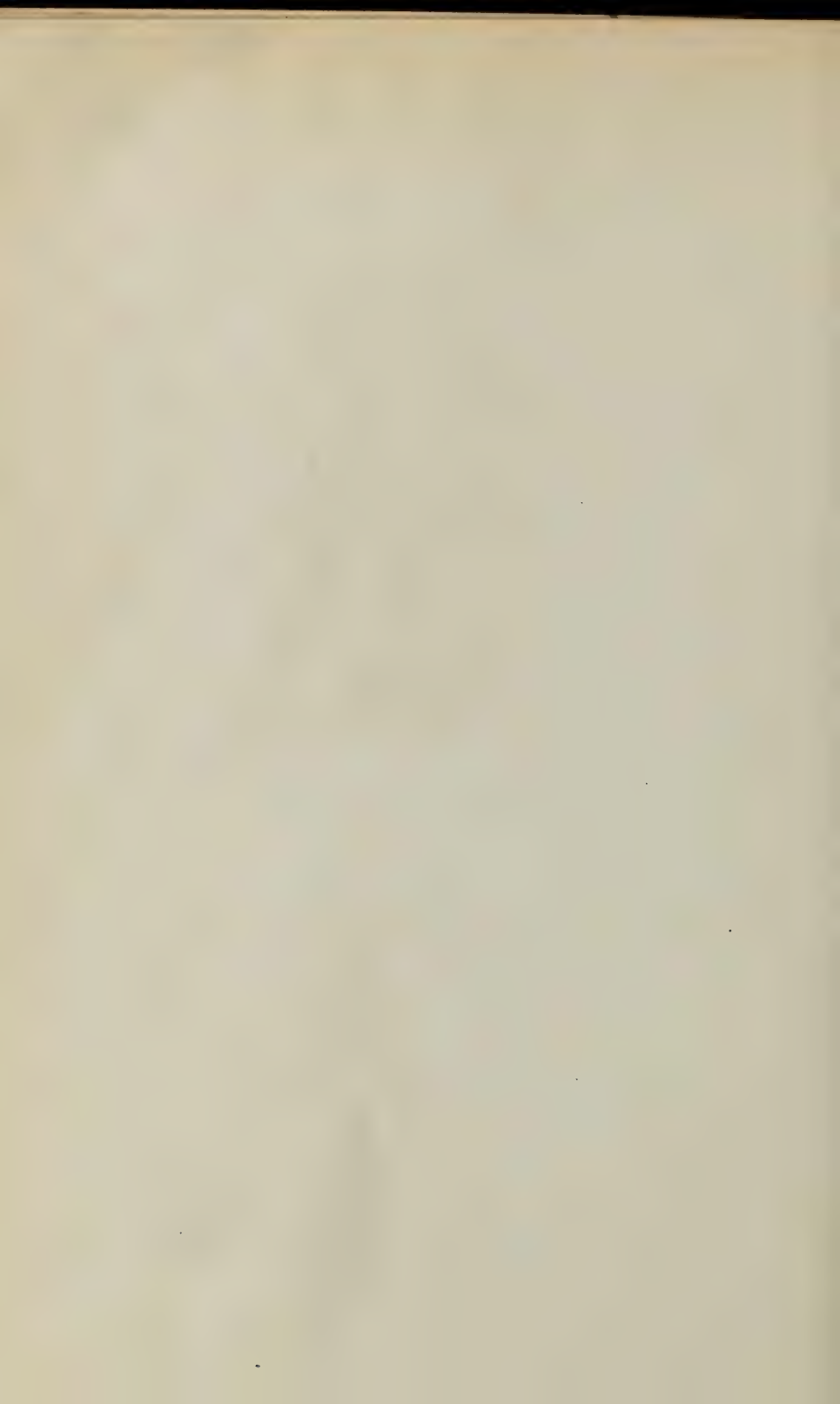
OCT 14 1916

F. D. Mondragon



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No.

United States Circuit Court of Appeals
For the Ninth Circuit

MENASHA WOODEN WARE COMPANY, a corporation,

Plaintiff in Error,

vs.

SOUTHERN OREGON COMPANY, a corporation;
COOS COUNTY; ROBERT R. WATSON, County Clerk of Coos County; A. JOHNSON, Jr., Sheriff of Coos County; T. M. DIMMICK, Treasurer of Coos County, Oregon, and the FIRST NATIONAL BANK OF COOS BAY,

Defendants in Error.

Brief on Behalf of Plaintiff in Error

Upon Writ of Error

to the District Court of the United States for the District of Oregon.

This case comes here upon a Writ of Error to the District Court of the United States for the District of Oregon to review the decision of that Court sustaining a demurrer to Plaintiff's Amended Complaint, and, plaintiff declining to plead further, in entering judgment against plaintiff for costs.

For a clear understanding of the points involved, the following concrete statement of the allegations of the complaint may be considered as accurately outlining plaintiff's position.

I.

On the second day of July, 1912, the Southern Oregon Company brought suit in the Circuit Court of the State of Oregon for Coos County against W. W. Gage, Sheriff and Tax Collector of Coos County, to restrain said Sheriff from advertising the property of the said Southern Oregon Company for sale for delinquent taxes or from issuing tax delinquency certificates against plaintiff's property.

II.

The complaint in the suit of the Southern Oregon Company against Gage, while not pleaded in the complaint in this suit, was used in the argument by both sides and its terms admitted, and it may be considered now as before the Court. That said complaint contained an offer by the Southern Oregon Company to pay into Court an amount of money equal to the taxes upon the lands of the said Southern Oregon Company, the money to be delivered to defendant (Gage) upon a contingency, which was stated as follows:

"The plaintiff is ready and willing and able to pay all moneys now appearing to be due as taxes upon said lands as shown by the tax rolls of said county either into the hands of the

Clerk of this Court or into the hands of a receiver to be appointed by this Court, and the plaintiff now brings said money into Court and offers to pay the same either into the hands of the Clerk of this Court or into the hands of a receiver to be appointed by this Court, upon an order of this Court, requiring said Clerk or receiver to hold said moneys in trust, to be delivered to defendant if it shall finally be decided by the United States Court where said cause is now pending, that said lands are subject to taxation, but to be repaid to this plaintiff in case it shall be decided by said Court that said aforesaid lands are the property of the United States of America."

That said bill of complaint prayed for an order temporarily restraining the said Gage from advertising the property of said Southern Oregon Company or from issuing delinquency tax certificates, and furthermore, prayed for an order appointing a receiver to receive the money to be so deposited by the Southern Oregon Company, and for an order requiring the defendant (Gage) to issue and deliver to said receiver tax receipts for all the taxes then due upon the lands.

III.

That immediately upon filing said complaint, and on the third day of July, 1912, the Court *ex parte* made the following order:

“This matter now coming on to be heard the Court having read the complaint herein and being fully advised in the premises and the Court being satisfied that this is the proper case for the issuance of a temporary order of injunction,

It is hereby ordered that upon the payment to the Clerk of this Court by the plaintiff, the amount of money shown by the tax rolls of Coos County, Oregon, to be due from the plaintiff as taxes upon the lands assessed to the plaintiff as owners, the defendant W. W. Gage as tax collector for said county shall also deliver to the Clerk of this Court proper tax receipts for such taxes, and the said Clerk shall hold and retain said money and tax receipts until the final determination of the case of United States of America vs. the Southern Oregon Company now pending in the Circuit Court of the United States for the District of Oregon, Ninth Judicial Circuit, in whatever court said case may be finally determined; and upon such final determination if the real estate described in the complaint shall be held to be the property of the United States then said money so deposited with the Clerk shall be returned to the plaintiff, but if it be therein decided that said real estate does not belong to the United States, then said money shall be paid over by the Court to the defendant herein;

unless it shall meanwhile be otherwise ordered by this Court.

It is further ordered that the defendant, W. W. Gage, as sheriff and tax collector of said county do hereafter refrain from advertising any of said land or any part thereof for sale for the payment of delinquent taxes and that he do refrain from issuing any tax delinquency certificates against any of said land until the further order of this Court or a Judge thereof."

IV.

That a demurrer was filed by the defendant Gage to the complaint of the Southern Oregon Company in said case. It was claimed in the argument in the Court below by defendant's counsel and is admitted by plaintiff in error, that the decision on said demurrer was delayed until the third day of July, 1914, awaiting the opinion of the Supreme Court of the State of Oregon in the case of the Southern Oregon Company against Quine, 70 Oregon, page 63. This opinion was announced March 3rd, 1914, and rehearing denied April 7th, 1914.

V.

On the third day of July, 1914, the Court made and entered the following decree :

"Comes on now to be heard the demurrer of defendant to the complaint and demurrer of defendant to the supplemental complaint and the plaintiff appearing by A. S. Hammond, one

of its attorneys, and the defendant appearing by L. A. Liljeqvist, District Attorney, his attorney, and the Court having considered said demurrer and each of them, and being advised in the premises.

It is considered, ordered and adjudged that said demurrers be and each of them is sustained.

And the plaintiff stating in open Court that it would stand upon its Complaint and Supplemental Complaint and did not desire to amend or plead further.

It is considered, ordered, adjudged and decreed that plaintiff's suit be and the same is hereby dismissed and all restraining orders heretofore entered be and the same are hereby vacated and the temporary injunction issued herein is hereby set aside and said orders revoked, and it is further decreed that defendant have and recover his costs and disbursements issued herein and that execution issue therefor."

This decree was appealed from by the Southern Oregon Company and on the 13th day of April, 1915, the Supreme Court of the State of Oregon duly affirmed said decree. (Southern Oregon Co. vs. Gage, 76 Or. p. 427.)

VI.

Neither W. W. Gage, the Sheriff in office at the time the suit of the Southern Oregon Company against Gage was brought, nor the defendant A.

Johnson, Jr., who is the present Sheriff and Tax Collector of Coos County, Oregon, ever delivered to the said Clerk of Coos County, Oregon, any tax receipts or receipt on account of any taxes referred to in the complaint of the said suit of the Southern Oregon Company against Gage.

VII.

That all the money described in the complaint in this case belongs to the plaintiff, The Menasha Wooden Ware Company, and that plaintiff has duly demanded repayment of the same to plaintiff, which demand was made upon each of the two banks, upon the Treasurer and Clerk of Coos County, and payment has been refused.

VIII.

That the said suit of the Southern Oregon Company against W. W. Gage is ended and no further order can be made therein. That Sec. 3693 and 3694, Lord's Oregon Laws, provide for the issuance of certificates of delinquency for unpaid taxes and the manner of their foreclosure. That all the certificates of delinquency issued against the property of the Southern Oregon Company for the taxes involved in the said suit of the Southern Oregon Company against Gage are now being foreclosed in the manner provided by Secs. 3693-3694, L. O. L., and this without any reference to the said suit of the Southern Oregon Company against Gage.

IX.

Under the Oregon statute providing for the taxation of property and collection of taxes, the tax on real estate can be collected only from the real estate taxed. Under the law, prior to 1907, this was different. A warrant for the collection of delinquent taxes was deemed an execution against property and might be levied on the land taxed or any other property of the delinquent taxpayer. But this was changed by the Act of the Legislature of February 28, 1907, and delinquent taxes are now collected in accordance with the terms of Sections 3693 to and including 3705, Lord's Oregon Laws, and not otherwise.

THE DEFENDANT'S CONTENTION.

While numerous demurrers and motions have been filed by the different defendants directed against the complaint, they all revolve around two propositions:

(a) An action for money had and received will not lie upon the facts set out in plaintiff's complaint.

(b) Even conceding that plaintiff has rights in the premises and is entitled to demand the return of its money, yet the money held by the banks is in *custodia legis* and therefore the plaintiff cannot sue for its recovery but must apply to the Circuit Court of Coos County for an order of distribution.

We will endeavor to answer these propositions in the order of their presentation, and, first:

ACTION FOR MONEY HAD AND RECEIVED.

The action for Money Had and Received is a quasi-equitable action and the scope of the relief granted by the Court in cases where this action lies is not restricted by any technical rule. The Court recognizes the situation in each case and by its decree meets its requirements. We cite the Court to the following authorities in support of our complaint:

“The question in an action for money had and received is, to which party does the money in equity, justice and law belong? All that plaintiff need show is that the defendant holds money which in equity and good conscience belongs to him (plaintiff).” 27 Cyc. 854.

“The rule is well settled that an action for money had and received will lie to recover money paid by plaintiff to defendant for a consideration which has wholly failed.” 27 Cyc. 855.

“In an action for money had and received it is immaterial how the money may have come into the defendant’s hands and the fact that it was received from a third person will not affect his liability, for in equity and good conscience he is not entitled to hold it against the true owner.” 27 Cyc. 864.

In *Hexter v. Poppleton*, 9 Oregon, page 483, Lord, C. J., said:

“This is an action for money had and received by the defendant to the plaintiff’s use. It is said, in general, to lie for money which, *ex sacquo et bono*, the defendant ought to refund as for money paid by mistake, or upon a consideration which happens to fail, or for money obtained by imposition or extortion, or oppression, or taking an undue advantage of a party’s situation, contrary to laws made for the protection of persons under these circumstances, and a sale made with such knowledge on the part of the party who causes it to take place, renders him liable in an action for money had and received.” (Herman on Executions, Sec. 340, and authorities cited in the note.)

“Lord Mansfield calls the action of assumpsit for money had and received, ‘a liberal action founded upon large principles of equity,’ and applicable wherever the debtor, having received money, cannot conscientiously retain it.” (*Moses v. McFarlone*, 2 Burr. 1005.)

In *Stewart v. Phy*, 11 Oregon, pp. 335-336, the Court said:

“Payment for Special Purpose—Action for Money Had and Received. An action for money had and received, lies to recover back money paid by a debtor to his creditor, to be applied in satisfaction of a particular obligation, when

the same is not so applied, and the obligation is otherwise discharged. It is not necessary in such action to allege a promise to repay."

"It appears from the allegations that the respondent has money belonging to the appellant to the amount for which judgment is demanded, in his hands, which he clearly has no right to retain from the appellant, and we think the action lies."

Crane v. Runey, 26 Federal, pp. 15-16:

"Money Received on Erroneous Judgment.

"Where money is received on an erroneous judgment by a party thereto, the law, on a reversal of the same, raises an obligation against such party to restore the amount, which obligation may be enforced by an action as for money had and received to the use of the plaintiff therein."

"The law is well settled that on the reversal of a judgment an obligation arises on the part of the party to the record who has received the benefit of the erroneous judgment to make restitution to the other party of or for what he has thereby lost. The reversal of the judgment gives a right of action as between the parties thereto, and creates an obligation against the one who has had the benefit of the same to restore to the other what he has thereby lost. At one time it was the practice to obtain this restitution, either by a writ of restitution when

the record showed what had been lost or what money had been paid, and in other cases by a *scire facias quare restitutionem non*, issued out of the Court where the judgment was given. But with the growth of the action for money had and received, these proceedings fell into disuse, and the obligation to restore has long since been enforced by action; and under the code there is no other remedy that I am aware of." *Bank of U. S. v. Bank of Washington*, 6 Pet. 17, 19; *Clark v. Pinney*, 6 Cow. 299. And see *Yates v. Joyce*, 11 Johns, 140; *Hoster v. Poppleton*, 9 Ore. 482; *Rapalje & S. Law Dict.*, "Restitution," "Scire Facias."

Walsh v. National Broadway Bank, 32 N. Y. Supp. 734-736:

"Money Had and Received—When Lies.

"An action for money had and received lies against a bank with which money belonging to plaintiff had been deposited by a third person in his own name, and it is immaterial whether or not the bank had knowledge of the facts when it received the deposits."

"The rule must be regarded as well established by frequent decisions of the courts in this state that, so long as money or property belonging to the principal, or the proceeds thereof, may be traced and distinguished in the hands of the agent, or his representatives or assignees, the principal is entitled to recover

it, unless it has been transferred for value, without notice. In other words, when the debt created by a deposit belongs to the principal, instead of the agent who made it in his own name, the bank, upon notice of the facts, must recognize the actual, rather than the nominal, depositor. *Van Alen v. Bank*, 52 N. Y. 1; *Baker v. Bank*, 100 N. Y. 31 (2 N. E. 452); *Viets v. Bank*, 101 N. Y. 563 (5 N. E. 457); *O'Connor v. Bank*, 124 N. Y. 324, 332, 333 (26 N. E. 816); *Holmes v. Gilman*, 138 N. Y. 369 (34 N. E. 205). The case before us comes clearly within this principle. The plaintiff, by this action, seeks to recover only such a sum as remained on deposit with the defendant after notice had been given to it of the plaintiff's claim of title thereto. The case, therefore, is free from hardship to the defendant, which, at most, will be required to repay to the plaintiff only such sum as it would have been compelled to pay to her attorney at the present time if such notice had not been given; in other words, payment to the principal will absolve the defendant from making payment to the agent.

"It is immaterial whether the defendant knew of the trust when it received the deposit in question. Church, C. J., in speaking for the Court upon this subject in *Van Alen v. Bank*, *supra*, at page 10, says:

"It was suggested on the argument that notice to the bank by the depositor was neces-

sary, to protect the rights of the plaintiff, but this is not so. The title of the plaintiff does not depend upon whether the bank knew he had a title or not. That rested upon other facts. A notice to the bank might have prevented any transfer or the creation of a lien by the depositor, or prevented the bank from taking or acquiring such lien in good faith, but could not otherwise be necessary or important.’ ”

And in *Roberts v. Ely*, *supra*, Andrews, J., who spoke for the Court, at page 132, 113 N. Y., and page 606, 20 N. E., said :

“It is immaterial, also, whether the original possession of the money by the defendant was rightful or wrongful. It is sufficient that the duty exists on his part, created by the circumstances, to account for and pay it over to the plaintiff.”

In *Walsh v. National Broadway Bank*, 33 N. Y. Supp. 998-999, the Court said :

“Money intrusted to an agent for specific investment, but by him diverted from its destination, and deposited in bank to his personal account, may, after demand, be recovered of the bank by the principal, in an action for money had and received, although at the time of the deposit the bank had no notice of plaintiff’s right, and although at the time of the demand

the plaintiff did not present the depositor's check. 32 N. Y. Supp. 734, affirmed."

"The demurrer concedes that the money was plaintiff's, not Breck's, and that defendant holds it merely as a depository for Breck. But, being the money of plaintiff, and wrongfully deposited by Breck to his own account, by what right may the defendant retain it from the lawful owner? The answer is that by the deposit the money became the property of defendant, and it became a debtor to Breck for the money. Undoubtedly, this is the relation between Breck and the bank; but the plaintiff is not a depositor with the defendant, and the deposit of her money by Breck, as his, was utterly ineffectual to divest her title. O'Connor v. Bank, 124 N. Y. 324, 333, 26 N. E. 816. In the absence of estoppel, one may not be deprived of his property by the wrongful act of another. The defendant's position is as custodian of a fund to which, *ex aequo et bono*, the plaintiff is entitled; and, by virtue of elementary principles, she may reclaim it in a common-law action, even though the defendant received it without notice of her right. Roberts v. Ely, 113 N. Y. 128 (20 N. E. 606); Chapman v. Forbes, 123 N. Y. 532 (26 N. E. 3); Bank v. Peters, 123 N. Y. 272 (25 N. E. 319); O'Connor v. Bank, *supra*, Refining Co. v. Fancher, 145 N. Y. 552, 557, 40 N. E. 206."

Garland v. Salem Bank, 6 American Decisions

“MONEY PAID UNDER MISTAKE—The indorser of a promissory note, ignorant that a demand had not been duly made on the maker, nor due notice given, paid the amount to a bank where it was left by the holder for collection, which amount was passed to the holder's credit by the bank. Within three days, the indorser, having discovered his mistake, and the money not yet having been paid over, reclaimed it from the bank. It was held the indorser could recover the money from the bank, although after the reclamation they had paid the amount to the holder.”

In *Van Alen v. American National Bank*, 52 N. Y. 1-6-7, the Court said :

“Where an agent deposits in a bank, to his own account, the proceeds of property sold by him for his principal, under instructions thus to keep it, a trust is impressed upon the deposit in favor of the principal, and his right thereto is not affected by the fact that the agent at the same time deposits other money belonging to himself; nor is it affected by the fact that the agent, instead of depositing the identical moneys received by him on account of his principal, substitutes other moneys therefor.

“In such case, in an action brought by the principal against the bank, upon its refusal to pay upon presentation of the agent's check for the amount so deposited, the bank cannot set

up a want of privity. It is a question of title solely."

"It is said that the secret intention of Van Alen & Rice cannot effect such a result. Between them and the defendants as to the substitution it was not a secret. They in substance notified the plaintiff that they had placed on deposit the proceeds of his bonds and would keep it for him. They did deposit the amount which they treated as the proceeds, and declared it to be such. Can they deny it? Can anyone for them? If I send a note to an attorney to collect, and deposit the money in a bank in his own name and keep it for me, is my title to the money impaired because he fails to deposit the identical bills? My agent collects \$100 rent for me and puts the bills in one pocket and takes the same amount from another pocket and deposits it and notifies me. Are my rights gone by the change of money? I think not. Stripped of unsubstantial forms, the case presented is that of a person delivering stock or bonds to an agent for sale with directions to deposit the proceeds in a bank to the credit of the agent, but to keep it in that way for him, and the agent follows the directions. Can there be a doubt as to the ownership of the money as between the agent and principal? Clearly not."

In *Beardslee v. Horton*, 3 Michigan, 560-564, the Court said:

“An action for money had and received will lie where the defendant has in his possession money which in equity and good conscience belongs to the plaintiff, and it is not essential that there should be an express promise to pay, or any privity between the parties.”

“The case of *Cooper v. Wrench* was an action of assumpsit for money had and received against the sheriff, who had collected the money in an execution in favor of the plaintiff's assignor. The court held the action maintainable.”

“In the case of *Allen v. Impett*, the court say: ‘This action is brought to recover the amount of dividends of stock to which the bankrupt was entitled, and which his trustees have received since the bankruptcy and applied to various purposes; with full notice of the bankruptcy, they refused to pay the money to the assignees. There cannot be any difficulty in sustaining this action, the whole of the money having been virtually received by the trustees.’”

“In the case of *Eddy v. Smith*, it was held that a purchaser of the equity of redemption could maintain an action for the surplus in the hands of the mortgagee who was the purchaser at the mortgage sale.”

“It will be found upon examination, that it is not essential to the maintenance of this action, that there should be any express promise to pay, for the law implies a promise where justice imposes a duty.”

In *The Travellers' Insurance Company v. Health*, 95 Penn. State, 333-339, the Court said:

"Restitution is not of mere right. It is frequently a matter of grace and resting in a sound discretion. Where, therefore, the Supreme Court, upon the reversal of a judgment on which the money was made, refused to grant a writ of restitution, said refusal is not a bar to the recovery of the money, where upon a second trial the verdict was for the defendant."

"The contention in the sixth assignment is that the refusal of this court to grant a writ of restitution immediately upon the reversal of the first judgment is a bar to this action. We do not think so. Restitution is not always of right; it is frequently a matter of grace, and the refusal to grant the writ before the second trial was had, and the right of the insurance company to recover the amount of premiums collected finally determined, cannot be a bar to the present suit instituted after the first was ended. In *Harger v. Commissioners of Washington Co.*, 2 Jones, 251, it is said: 'Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it.' In refusing the order of restitution the court may have been influenced by the fact, apparent on the record, that the plaintiff in error was guilty of laches in not prosecuting his first writ of error and permit-

ting the same to be *non prossed*, whereby he lost the benefit of his writ as a supersedeas; but, on whatever ground it may have been refused, we are of opinion that the refusal at the time and under the circumstances is not a bar to the present action."

Critzer v. McConnell, 15 Illinois, 172:

"Trust Funds — Misapplication — Form of Action.—If A. pays money to B. to be applied to a particular purpose, and B. delivers the same money to C. to be applied by C. to the same purpose, if C. misapplies the money, A. may recover the money back from C. in an action for money had and received."

Lawyers' Reports, Annotated, Book 4, p. 368 (syllabus) :

"AN ACTION OF ASSUMPSIT MAY BE MAINTAINED by the owner of stolen money, to recover the amount thereof against one with whom it was deposited by the thief, and who, after notice of the owner's rights, paid it upon the thief's order to third persons."

Etna Insurance Co. v. Mayor, etc., 47 N. E. 593:

"When an assessment of taxes is valid on its face, but is void in fact from lack of jurisdiction in the assessors, an action may be maintained to recover money involuntarily paid in satisfac-

tion thereof, without first demanding its return, or having the assessment set aside."

Clark v. Pinney, 6 Cowen's N. Y. 299:

"Curia per Savage, Ch. J. The important question in this case is, whether *indebitatus assumpsit* for money had and received, lies to recover money paid on an execution upon a judgment, which was afterwards reversed.

"The general proposition is, that this action lies in all cases where the defendant has in his hands money, which, *ex equo et bono*, belongs to the plaintiff. When money is collected upon an erroneous judgment, which, subsequent to the payment of the money, is reversed, the legal conclusion is irresistible that the money belongs to the person from whom it was collected. Of course, he is entitled to have it returned to him. The only question is, whether this be the proper remedy."

Cole v. Bates, 72 N. E. 333:

"An action for money had and received will lie where defendant has received money to which the plaintiff has an equitable right; plaintiff being able to trace the money in quity into defendant's hands, regardless of whether the money was deceived by defendant in the first instance."

It is apparent from these authorities that this action is properly brought for Money Had and Received for Plaintiff's Use and Benefit.

In such an action it is immaterial who deposited the money. The Court will not inquire who deposited it, how it was deposited, or when.

27 Cyc. 849.

Peterson v. Joss, 12 Ore. 81.

When the defendant has money in his possession which in equity and good conscience he cannot retain, it is unnecessary to allege a contract to pay over. The law implies the contract creates the liability and provides the means for its enforcement.

BUT A SINGLE CAUSE OF ACTION.

Something was said in the argument about two causes of action in the complaint. There is but one cause of action in each complaint.

SINGLE CAUSE OF ACTION.

When a single and continuous purpose runs through an entire transaction, made up of various acts, each of which might alone constitute a cause of action, it is proper to set up all the facts in one count as a single cause of action. 31 Cyc. 119.

In *Boyce v. Odell Commission Co.*, 107 Fed. 58, an action to recover money lost in gambling on options—an action for money had and received—when the sums claimed were paid by the plaintiff to

the defendant at various times covering a period of several months, it was held that all of the transactions were properly set up in a single cause of action, the court saying:

“It is oftentimes a nice and difficult question to determine when a given state of facts may be pleaded in a single paragraph as a single cause of action, and when those facts must be set up in separate paragraph.

“In the present case the court is of the opinion that the facts stated in the complaint constitute one continuous transaction which is properly pleaded in the single count. The bets or wagers were all in pursuance of the common purpose, to carry on a scheme of gambling in margins. * * * One single and continuous purpose evidently ran through the entire transaction.”

The court cited a number of cases from various jurisdictions to sustain this ruling.

The rule is well settled that an action for Money Had and Received will lie to recover money paid by plaintiff to defendant for a consideration which has wholly failed. 27 Cyc. 855.

In an action for Money Had and Received, it is immaterial how the money may have come into the defendant's hands, and the fact it was received from a third person will not effect his liability if, in equity and good conscience, he is not entitled to hold it against the true owner.

CUSTODIA LEGIS.

Passing now to the second point in defendants' demurrer, we will discuss the doctrine of *custodia legis*. There is no dispute between counsel for defendants and ourselves as to this doctrine, which has become so firmly grafted upon judicial procedure everywhere that it may be regarded as fixed and unchangeable. It is as to the definition of the principle upon which it rests that we differ, and the sweep of its application in the present case.

Counsel for the defendants seem to be of the opinion that when money has once come into the hands of the clerk of a court in any proceeding in that court, it must remain for all time so deposited until *that* court orders its return or distribution—and this without reference to whether or not the purpose for which it was deposited has been accomplished, and without considering at all whether the proceeding which called for its deposit has been dismissed or abandoned. This is not the law—here, or anywhere.

To the end that the Court may exercise its powers unfettered and an orderly administration of justice be had without collateral interference, it is essential that the Court's possession of things it has taken hold upon be protected so long as that possession is necessary in the proceeding in which possession was taken. When the proceeding, whatever it may be—law or equity, bankruptcy, probate or admiralty—is ended, *custodia legis* is ended at the same time, and although there may be actual

physical possession of the thing itself still remaining in the officer, the intangible, impalpable—*nolo me tangere*—of the law is lifted and the property becomes subject to attachment, replevin or assumpsit as if it had never been in *custodia legis*. And so are the authorities.

It must be remembered in any discussion of this case that the order of July 12, 1912, was an *ex parte* order made without undertaking to pass upon the *merits* of the application. It did not order the Southern Oregon Company to do anything. It *did* order the defendant W. W. Gage to do something:

“It is hereby ordered that upon the payment to the Clerk of this Court by the plaintiff the amount of money shown by the tax rolls of Coos County, Oregon, to be due from the plaintiff as taxes upon the land assessed to the plaintiff as owner, the defendant, W. W. Gage, as tax collector for said county, *shall also deliver to the Clerk of this Court proper tax receipts for such taxes*”—

is the language of the order. The defendant never did deposit the tax receipts, nor any of them. The order was made conditional upon his doing so. There was then merely an offer by the Southern Oregon Company to deposit the money in court if the defendant would deposit the tax receipts. This offer could be withdrawn at any time until acceptance, and it was never accepted. The defendant had the right to accept plaintiff's offer and deposit

the tax receipts, and if he had done so, the matter would have rested there, but he chose the other course. He denied the plaintiff's right to even make the offer—that is, he demurred to the complaint on the ground that it stated no legal reason why plaintiff should be permitted to remain in Court. Upon a hearing, his contention was sustained, plaintiff's case was dismissed, and judgment for costs entered against plaintiff. This judgment was affirmed by the Supreme Court. There is no longer any case in the Circuit Court of the State of Oregon for Coos County. There is no order to be made, or that can possibly be made concerning this money, except to give it back to the plaintiff. In 13 Cyc., p. 136, it is said:

“A deposit in Court cannot ordinarily be taken out of Court by the depositor, *but if it was made on a condition with which the other party refuses to comply, the depositor may withdraw the fund as a matter of right.*”

In support of the foregoing proposition, the case of

Cummins vs. Rapley, 17 Ark., p. 381,

is cited, and it will be seen by an examination of the case that it fully bears out the principle stated. One Cummins filed a Petition in Chancery, alleging that Charles and Abraham Rapley had filed a bill against himself and others, alleging that he, Cummins, had recovered a judgment against the Rapleys on the law side of the Court for a certain sum

of money upon a note. That one-third ($1/3$) of said debt was due and payable according to the tenor of a certain contract and deed of trust made by the Rapleys theretofore to secure the said debt, among others. That by the bill which the Rapleys filed they offered to pay the debt according to the terms of the said deed of trust, and that they asked for an injunction against the collection of the judgment, and that the petitioner in the present suit be compelled to receive the money so offered to be paid according to the terms of the deed. That when the installment of one-third ($1/3$) of the amount of the judgment became due, according to the terms of the deed, the Rapleys deposited the one-third ($1/3$) with Peay, the Clerk of the Court. That upon the hearing of the Rapleys bill, Cummins refused to accept the money under the deed, but offered to take the same as absolute payment upon the debt. That the injunction against the collection of the judgment was dissolved and the bill dismissed, and on appeal to the Supreme Court the judgment was affirmed. That after the appeal was taken, Peay, the Clerk, permitted one of the Rapleys to withdraw the money without leave of Court. Cummins claimed that the Court should have ordered the money paid on the judgment, and prayed for a rule upon the Clerk and Charles Rapley to show cause why the money should not be restored.

The response of Peay and Rapley admitted the allegations of the bill. The Court said:

"The authorities cited by appellant do not sustain his right to have the money brought again into Court and paid over upon the judgment. No doubt where a defendant brings into Court and deposits so much money as he admits to be due the plaintiff on a demand sued for, it is a payment *pro tanto*, and he has no right to withdraw it. * * * *

"But here the complainants in the chancery suit deposited with the Clerk in vacation a sum of money for a specific purpose, subject to be accepted and withdrawn by Cummins on the terms and conditions upon which it was deposited. He declined so to accept it. On the hearing the bill was dismissed, and thereby the object for which the deposit was made by complainants was defeated.

"Cummins refused to accept the money on the terms proposed, and the Court denied the relief sought. We think the Rapleys had a right to withdraw the money."

The Supreme Court therefore affirmed the judgment of the Court below, denying the prayer of Cummins' petition that the money be restored to the Clerk.

In *Harrington vs. La Rocque*, 13 Ore., pp. 344, 347, the Supreme Court, by Lord, Chief Justice, said:

"It may be considered clear that when the distributor's share of an heir has been ascer-

tained and ordered paid by the Court, it is no longer regarded as in the custody of the law. The right to it has become fixed and the Executor ceases to hold it in his representative, but in his personal capacity. After distribution has been decreed, it may therefore be garnished in the hands of the Executor. And if the heir has assigned his interest or distributive share, the assignee may notify the Executor of his assignment for the purpose of requiring payment to him."

In *Fleischner vs. Bank of McMinnville*, 26 Ore., pp. 553, 561, the Supreme Court was confronted by the claim that money in the hands of an assignee for the benefit of creditors was in *custodia legis*, and the ownership could not be inquired into, but the Court said:

"A sufficient answer to the first objection is that this suit proceeds upon the theory that the assignment is fraudulent and void and therefore has no force or effect whatever. In such case the attempted assignment could not operate to place the property of the assignor in *custodia legis*, even if a valid assignment were to have that effect, and we are not advised of any rule of law which prevents a court of equity of competent jurisdiction from assuming jurisdiction upon a proper complaint to try and determine the validity of an alleged fraudulent assignment under the statute."

The lawful custody of specific property by a court of competent jurisdiction withdraws that property only *so far as necessary to accomplish the purpose of that custody, and until that purpose is accomplished* from the jurisdiction of every other Court:

Lang vs. Railroad, 160 Fed. 355;

Mound City vs. Castleman, 187 Fed. 921-924.

In Moran vs. Sturges, 154 U. S. 256, Fuller, Chief Justice, quoted from Buck vs. Colbath, 3 Wall. 334, 341, 345, as follows:

“A departure from this rule (i. e., that a court of concurrent jurisdiction will not interfere with property in custody of another court) would lead to the utmost confusion, and to endless strife between courts of concurrent jurisdiction deriving their powers from the same source. * * * *

This principle, however, has its limitations. Or, rather its just definition is to be attended to. It is only while the property is in possession of the Court, either actually or constructively, that the Court is bound, or professes to protect the possession from the process of other courts. *Whenever the litigation is ended, or the possession of the officer or Court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not.*”

In *Dunn v. Hunt*, (Minn.) 78 N. W. 1110, there was presented to the Court the question of the right to withdraw money deposited in Court to redeem from a mortgage foreclosure sale. Plaintiff had by order of Court paid into Court the money which he had tendered, amounting to \$1,262. Before the case was decided, however, he obtained an order withdrawing the money. The decision of the case was against the defendant and he immediately moved to have the order permitting plaintiff to withdraw his tender rescinded and for a further order to impound sufficient of the money so deposited to satisfy his judgment. The Court denied the defendant this relief and answering the contention made there, as here, that the money being deposited in Court could not be withdrawn because in *custodia legis*, said:

“But defendant never had any claim to or lien upon this money merely because it was paid into Court, because he always maintained a position hostile to and wholly inconsistent with any such claim and the judgment of the Court vindicates his position.”

Merwin v. Fowler, (Wash.) 56 Pac. 374.

McAlmond v. Bevington, (Wash.) 63 Pac. 251.

Leroux vs. Baldus, 13 S. W. (Texas) 1019:

In an action brought against Connolly & Co. by the Galveston, etc., R. R. Co. the latter deposited with the Clerk of the District Court the sum of \$7,226.21 to await the result of the suit. The plain-

tiff in that case recovered judgment for \$5,004.06 which the Clerk paid, leaving in his hands \$1,931.89. The plaintiffs in the above case, Leroux & Cosgrove, then sued Connolly & Co. to recover \$445.86 and garnisheed Baldus, the Clerk. They recovered judgment against Connolly and the Clerk who refused to pay over the money, and the present action was then brought against Baldus to compel the payment by him of the amount of the plaintiff's judgment, but the Clerk defended on the ground that the surplus remaining in his hands was in *custodia legis* and therefore not subject to garnishment. The Court said :

“The general rule that money or property in custody of the law is not subject to garnishment is well settled, and not questioned in this case. The reason upon which the doctrine is based is that ‘no person deriving his authority from the law, and obliged to execute it according to the rules of law, can be holden by process of this kind.’ *Brooks v. Cook*, 8 Mass. 246, cited in *Pace v. Smith*, 57 Tex. 558. But this reason does not apply to the surplus or residue remaining with the officer after he has satisfied the writ, as he no longer holds it by virtue of any legal process, and it can therefore be reached by the defendant's creditors. Money paid to the Clerk of a Court in a partition suit was held to be liable to attachment after the Court had ordered it to be paid to the parties entitled thereto. *Freem. Ex'ns*, 130; *Drake*

Attachm. 509. Such is the weight of authority on this subject. In the present case the judgment in the case of the Galveston, Houston & San Antonio Railway Company against Connolly & Co. was the authority for the payment of the amount of the judgment (\$5,004.06) to the former, and no further order to the Clerk was necessary. *The ascertained surplus, \$1,931.89, then left in the Clerk's hands, could no longer be regarded as in the custody of the law.*"

Wilbur v. Flannery, 15 Atl. 203, 60 Vt. 581:

"Powers, J. In the execution of a decree of the court of chancery the defendant was ordered to deposit his deed of certain real estate in Underhill with the Clerk of that Court, upon a deposit with the Clerk for the defendant of a certain sum of money. The money and deed were both deposited with the Clerk in accordance with the decree. The deed was accepted, and taken by the party entitled, and the money was ready to be paid to the defendant when it was attached by the plaintiff. Both parties agree that money in *custodia legis* cannot be attached by the trustee process; and the inquiry is whether the legal grip upon this money had been dissolved. Our statute is broad, and subjects the goods, effects and credits of a debtor in the hands of a third person to the trustee process. The attaching creditor in such

process stands upon the right which his debtor has as against the trustee. In this case, Mr. Ray held money in his hands belonging to the defendant. As Clerk of the Court he had no further claim upon it. The purpose for which the law gave him its custody had been fully accomplished, and the only duty remaining was to pay it over to the defendant upon his call. If Mr. Ray had refused to pay it to the defendant on demand, the defendant clearly would have an action for the money. This being so, the plaintiff, as a creditor of the defendant, may reach the fund by this process. The only answer made by the defendant is that, on grounds of public policy, public officials should not be subjected to the trustee process, and this proposition is abundantly fortified by the exhaustive citation of authorities in the defendant's brief. But this case is outside the range of that proposition. Mr. Ray was a mere bailee of the money, not for the Court, nor for the parties to the litigation. As respects the deed and the money, which was to be exchanged, each for the other, he was the stakeholder appointed to effect the exchange. Any third person might as well have been appointed as the clerk. A sheriff who has collected money upon an execution is liable to the trustee process. He receives such money under color of his office, and holds it as a public officer. But his process has no further vitality when the money is collected, and he

has no remaining duty but to pay over the money. In this case, if Mr. Ray had held the money to be paid over when the Court should so order, he would be exempt from liability. But the order from the Court to pay it over antedated its receipt by him, and he was directed to pay when the deed was delivered. We can see no reason, under the language of our statute, why a clerk, under the circumstances detailed in the commissioner's report, should not be liable to the trustee process. The argument that he may be personally inconvenienced by being called away from his business applies to every other person exposed to this process. The judgment is reversed, and judgment is rendered on the report that the trustee is chargeable in the amount of the plaintiff's judgment against the principal debtor, and that the trustee recover his costs."

Dunlop vs. Patterson Fire Insurance Co., 74 N. Y. 145:

This was an appeal by James Jackson, the receiver of the property of the defendants in this action, from the order of the Supreme Court denying a motion by the receiver to set aside levies made under two attachments against the defendants or to allow the receiver to come in in the action in which the attachments were issued, for the purpose of moving to vacate the attachments, or the levies made thereunder.

The attachments were levied upon the sum of \$2,000, then in the hands of the Clerk of the City Court of Brooklyn, in lieu of an undertaking on appeal from a judgment in the action in favor of one Redfield against defendant. The appellant was appointed receiver after the levy of the attachment under and by stipulation, also made after the levy of the attachment. An order was entered in the Redfield suit settling defendant's liability, directing the Clerk to pay to the claimant therein, out of the \$2,000 on deposit, the sum of \$650, and to pay the balance thereof to defendant's attorney.

It was urged on appeal that the property which was attached in this case was in the custody of a court of record; that it was therefore incapable of being seized or levied upon by attachments and that the case was as if an attachment had been granted without the power so to do in the Court or judicial officer allowing it. The Court said:

“Doubtless the property, which was, in fact, made the subject of attachment, was in the custody of an officer of a court of record, and the appellant would at the time have had no right to remove it therefrom, or to meddle with it. But doubtless also, the appellant had a right and interest in that property, which was capable of being transferred by it, by its own act of assignment. Had it made an assignment of it, that act would not have removed it from the custody of the officer holding it, nor

would it have put upon him any greater liability than he assumed by the primary reception of it. He was liable to hold it, to answer the event of the litigation of Redfield with the appellant, and to return to the latter all that was not required to answer the proper demand of the former. And after the litigation should have been over with Redfield, would not the Clerk have been liable to the defendant for the whole of a residuum of the moneys, which liability could be enforced? And it was this last liability which would be the subject of the assignment. The claimant and real appellant, in this case, is a receiver appointed by a court in equity. He gets whatever title he has to this property, by operation of law, or by an assignment in fact, compelled by a court. Now could not that same liability be the subject of a transfer by process of law, as well as by the act of the corporation or by operation of law, and there be no illegal interference with the official power and duty of the officer holding the property? We think that it could. It may be granted that no process should have been issued which commanded the taking actual possession of the property, either exclusive of the Clerk of the City Court, or in common with him; nor, however the process was worded, should it have been executed by taking or attempting to take such possession. To such extent are some of the cases cited for the appellant. But there

was power to grant an attachment against the property of the appellant. The money in the hands of the Clerk of the City Court, or a residuary interest in it, was such property. The fund itself could not be taken away from him. It was the right to have from him, after the litigation with Redfield was ended, the whole or a residue of that money, which was such property. That right was not in the custody of that clerk, so that he could ever retain it, or, of right, pass it to another. An attachment against the appellant's property, levied upon that, took nothing out of the custody of the clerk, nor meddled with anything in his hands. It seized upon an intangible right, by means of the order of the Supreme Court and notice to the clerk of the issuance thereof. Such process and such action upon it made no conflict of jurisdiction between the two courts. The City Court held the money, with a conceded right. The officer of the Supreme Court held the right to receive it, or some of it, from the clerk, when the City Court should see fit to declare the purpose fully served for which it took it into custody."

Trotter vs. Lehigh Zinc and Iron Co., 42 N. J. Equity 456:

In certain litigation then pending involving a contract to mine and furnish ores to one of the parties being a non-resident, the whole consideration

paid out for the ores was ordered to be paid into Court as it became due so that in case the defendants, who established the right in the lower Court to set off any claim which they might have for damages, they could have this particular fund to satisfy such set-off in case there should be any decree of a pecuniary nature in favor of the complainant. The Court decided that the defendant had not the right to make such set-off; but as it was a matter of great importance to both parties, an order was made directing the retention of the moneys in the lower Court until the questions involved should be determined on appeal, in case an appeal should be taken to the Court of last resort. There was an appeal, and the Appellate Court also held that the defendants were not entitled to such set-off.

Then one Hockscher procured an attachment to be issued out of the Supreme Court of New Jersey against Trotter (the party who was entitled to the moneys which had been deposited,) which attachment was levied upon the moneys so deposited with the Clerk in the Court. The Court said:

"Trotter resists, and insists that these moneys cannot be attached, nor any right or interest of his therein. This is placed upon the ground that the money is in the custody of the law, awaiting the execution of the law. The law upon this subject is well settled in New Jersey. *There is no judgment to be enforced in*

this case. The money was paid into Court or to the Clerk as the money of Trotter; and it has been retained there ever since as his money. This being so, I think there is no doubt but that the rights and interests of Trotter therein are subject to attachment."

Weaver, Adm'r. vs. Davis, 47 Illinois Reports, pp. 235-7:

In this case the Sheriff received upon execution a certain sum of money, being more than the amount due on the judgment. An attaching creditor levied his attachment on this sum in the hands of the Sheriff and it was claimed that the money was *custodia legis*. But the Supreme Court of Illinois rejected the claim and said:

"Court—What the Court intended by this, was, manifestly that when, as an officer, he had done all that was required of him, and had paid into Court or to the plaintiff, the money collected by the writ, and that had become *functus officio*, and there was a surplus remaining in his hands which, though coming to him as an officer, he did not hold in that capacity, but as trustee for the debtor, he might be liable, as such trustee, for the surplus, in an action for money had and received, as in the case of *Pierce v. Carlton*, *supra*. As to the surplus, the Sheriff was but a trustee; the money was not in the custody of the law, and for it an action for money had and received could be maintained."

When property is taken lawfully by virtue of legal process it is in the custody of the law, not otherwise. (8th A. & E. Ency'l. of Law, 532.)

Gilman vs. Williams, 7 Wis. 329-334; 76 Amer. Dec. 219:

In this case the Deputy U. S. Marshal seized two horses, alleged to be the property of the plaintiff in the action and claimed by plaintiff to be exempt from execution. Plaintiff brought replevin against the Deputy U. S. Marshal. He answered that he took the horses by virtue of an execution, issued out of the District Court of the U. S., for the District of Wisconsin, and the property was, therefore, in *custodia legis* and not subject to an action of replevin in the said Court. The Supreme Court of Wisconsin rejected this claim and in a decision, which has become a leading case, held: *That it was competent for a party by replevin or otherwise to reach property although in the hands of a Marshal, Sheriff or other Court officer, and that he could recover unless the Court or Court officer established the fact that he had a legal right to retain the property for some purpose to be thereafter determined by the Court in the proceeding in which the property was taken.*

Curiously enough, this case was cited by counsel for defendant in error in the Court below as sustaining *his* contention, and we insert it here for that reason. It goes further in *our* favor than we would care to go ourselves *on the facts in that case.* But

the general principle announced in the last four lines *supra* is correct. In order to sustain his possession as being *custodia legis*, the officer must show that he has "a legal right to retain the property for some purpose to be thereafter determined by the Court whose officer he was, named in the writ."

As in every case presented to a Court, authorities might be multiplied by the hundred applying fundamental principles in the decision of cases similar in their general outline, but differing vitally in the particular facts which differentiate them. Quoted *en masse* they have a tendency to confuse more than to enlighten. We have endeavored in the foregoing citations to present only those cases which, in our judgment, meet squarely the objections urged in the demurrer. We submit that the demurrer should be overruled. The complaint is properly brought for Money Had and Received. The money is not in *custodia legis*, and there is no possible order that the Court in Coos County could make with reference to it now. The object to accomplish which it was deposited was not accomplished—can never be accomplished. The state is proceeding as it has a right to do to collect its taxes by the foreclosure of delinquency certificates against the property of the Southern Oregon Company. It has not been injured by the litigation, the certificates of delinquency bearing interest at the rate of fifteen (15) per cent, and the property must pay it. There is no lien upon this money in favor of anyone. No one claims it or can claim it except

the plaintiff. Confessedly it belongs to the plaintiff, and the refusal of defendants to pay it over on demand is unexplainable and—unconscionable.

Respectfully submitted,

DOLPH, MALLORY, SIMON & GEARIN,

Attorneys for Plaintiff in Error.



United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MENASHA WOODEN WARE COMPANY, a
corporation

Plaintiff in Error

vs.

SOUTHERN OREGON COMPANY, a corpora-
tion; COOS COUNTY; ROBERT R. WATSON,
County Clerk of Coos County; A. JOHNSON,
Jr., Sheriff of Coos County, and T. M. DIM-
MICK, Treasurer of Coos County, Oregon; and
the FIRST NATIONAL BANK OF COOS BAY,

Defendants in Error

**Brief on Behalf of Defendants in Error Coos County
and Its Officers**

Upon Writ of Error

to the District Court of the United States for
the District of Oregon

Dolph, Mallory, Simon & Gearin,
Mohawk Bldg. Portland, Ore-
gon. Attorneys for Plaintiff in
Error.

W. U. Douglas, Marshfield, Oregon.

Attorney for First National Bank of Coos Bay.

L. A. Liljeqvist, Marshfield, Oregon

Attorney for Coos County, et al.



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No.

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POINTS AND AUTHORITIES

I

It is the duty of the county clerk of Coos Coun-
ty, who by virtue of his office is ex-officio clerk of
the Circuit court, having or holding in his possession
or custody, public funds or money in trust for any
person, by virtue of his office, or any money held in
custodia legis, to, as soon as practicable pay the same

over to the county treasurer. Such moneys shall be paid out in accordance with the order of the court if said money is held in custodia legis.

Chapter 273, General Laws of Oregon, 1913,
Sec. 5.

II

In the absence of such a statute it is the duty of the clerk in using due care for the protection of such funds to place them in safe keeping.

5 Ruling Case Law 629, and cases cited.
Agoure vs. Peck, 121 Pac. 708. (Cal.)

III

It was ordered by the circuit court that upon the payment to the clerk of the court by the Southern Oregon Company of the amount of money shown by the tax rolls of Coos county, Oregon to be due from the plaintiff as taxes upon the lands assessed to the said plaintiff as owners, that the sheriff should deliver tax receipts. (Paragraph VII, Bill of Complaint.) It is alleged that in compliance with said order of court and on August 22nd, 1912, a check in the sum of \$75,000.000 was drawn in favor of the county clerk who endorsed and assigned said check to T. M. Dimmick on August 29th, 1912. As a matter of fact the pleading of the cashing of the check and assignment is erroneous for this was

not done until after the county depositary law went into effect. It is alleged that on July 19th, 1913 (which is after the said law went into effect) the county treasurer cashed this check and received the money and the same was deposited in the bank to his credit as county treasurer. It is further alleged that on March 18th, 1915, a check in the sum of \$18,309.07 payable to the clerk of the court of Coos County, Oregon, Robert R. Watson, defendant herein was delivered to said clerk and that this check was endorsed and assigned to Dimmick the county treasurer and assigned to the First National Bank of Coos Bay which collected it and credited it on its books to the account of Dimmick as county treasurer.

From these allegations it is very clear that the checks were negotiable and the money received from them was a deposit in the custody of the court. it was in custodia legis, and it was the duty of the clerk to deposit this money with the county treasurer.

12 Cyc 1024.

Weaver vs. Duncan, 56 S. W. 39, 41.

Bouvier's Law Dictionary, 3rd Ed.—Custodia Legis.

In re Receivership of New Iberian Cotton Mill Co. 33 So. 903, 904.

Black's Law Dictionary.—Custodia Legis.

First National Bank vs. Livingood, 109 Pac. 987, 988.

Shumaker and Longsdorff, Cyclopedic Law Dictionary. Custodia Legis.

August vs. Gilmer, 44 S. E. 143.

Gilman vs. Williams, 76 Am. Dec. 219.

Hagan vs. Lucas, 10 Pet. 411 (35 U. S.) 9 L. Ed. 470.

Moore Mfg. Co. vs. Billings, 80 Pac. 422, 424, 46 Or. 401.

Troll vs. City of St. Louis, 168 S. W. 167, 178.

Porter vs. Sabin, 37 L. Ed. 815, citing cases.

Farmers Loan and T. Co. vs. Lake Street E.

R. Co. 44 L. Ed. 667, 671.

177 U. S. 52, 62.

IV

It was ordered that the money be paid to the county clerk, the money was brought into court in the form of checks and certificates of deposit made payable to the county official. The checks and certificates of deposit were negotiable instruments and it was the duty of the official to convert them into money. A certified check or a certificate of deposit depends for its validity upon the solvency of the bank. This is a risk that no officer need assume, When a check or certificate of deposit is made to him as an officer under a pleading or order of court allowing the parties to deposit money, or where they plead that they bring money into court, it is the plain duty of the officer to turn the negotiable in-

strument into money. Upon its being converted into money it was the duty of the clerk to deposit it with the treasurer, who has a right to deposit it with a county depository if it is a public fund and it is his duty to do so; it is probably also the duty of the treasurer to deposit moneys held by the court in custodia legis in the county depository. It is a least proper for him to deposit them in a bank for safe keeping and his duty to do so.

5 Ruling Case Law p. 629 and cases cited.

Agoure vs. Peck, 121 Pac. 708.

Standard Encyclopedia of Procedure, Vol. 7, page 157.

Burke vs. Trewitt, 4 Fed. Cas. No. 2163.

Cyc. on Clerks of Court.

V

We contend that the fund mentioned in the Bill of Complaint was a fund in court under all the authorities, and the court in which a fund has been deposited has power to order distribution of it, and when jurisdiction is once obtained it is not lost either by the abatement of the suit or by the dismissal of the bill. The court by proper orders in the case where the fund has been brought into court will make such a disposition and distribution of the fund as is proper.

13 Cyc. 1038, cases cited.

Wright vs. Mitchell, 18 Vesey Jrs. Rep. Sumner's Ed. 293.

Sturdivant vs. Reese, 111 S. W. 261.

Standard Cyclopedia of Procedure, Vol. 7, p. 171, 170.

VI

The only remedy the Menasha Wooden Ware Company has, if they are entitled to the repayment of the money at all, is to file a petition to intervene in the case of Southern Oregon Company vs. W. W. Gage, in the Circuit Court of Coos County, Oregon, and petition the court for an order directing the payment to them of the money in question. This must be done by petition or motion, and upon notice to all the parties interested. The question as to whom the fund belongs will then be determined by the circuit court. If his decision is erroneous, the parties have their right of appeal to the Supreme Court of Oregon and possibly then by Writ of Error to the United States Supreme Court. This procedure for the return of the money is taken after final judgment and time for appeal has elapsed, and not while an appeal is pending. This procedure was taken by the Southern Oregon Company in the Circuit Court of Coos County, Oregon, and argued out before Judges J. S. Coke and G. F. Skipworth, but relief at that time was denied, due to the fact that a Writ of Error had been taken to the United States Supreme Court from the decision of the Supreme court of Oregon in the case of Southern Oregon

Company vs. W. W. Gage. No mandate had come down from the United States supreme court when this was filed and until it did no court had power to order distribution of the fund.

7 Standard Encyclopedia of Procedure 167, 170, 171, and large number of cases cited.

VII

A fund paid into court cannot be withdrawn or distributed except upon the court's order. No other court has jurisdiction to determine any question pertaining to the distribution of the fund. The rights of claimants to a fund deposited in court cannot be determined in another suit even after final decree. The court first acquiring jurisdiction of a fund has a right to retain it until the cause is finally disposed of, and its jurisdiction is not subject to be ousted by a court exercising a concurrent jurisdiction. This is particularly true of State and Federal courts. Where property is in the lawful possession of a state court, it cannot be seized by process issuing from a federal court. The state court has a right to keep property in its possession even though there are defects in the process by which it acquired possession. Property in the custody of a court is under its control and no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession or some superior jurisdiction in the premises.

This rule applies whether the property was taken upon attachment, execution, replevin, by receivership, by suits to enforce liens, to marshal assets, administer trusts, liquidation of insolvent estates or where property is voluntarily brought into court and certain action in reference thereto demanded.

Chap. 273, Laws of Ore. 1913, Sec. 5.

4 Ency of U. S. Supreme Court Reports,
1170 1172, 1173, 1175, and cases cited.

7 Standard Encyclopedia of Procedure, 167,
173, and cases cited.

Craig vs. The Governor, 43 Tenn. (3 Cold-
well's Reports) 244.

Allen vs. Gerard, 21 R. I. 467, 79 Am. St. Rep.
816, 44 Atl. 592.

Covell vs. Heyman, 111 U. S. 176.

Senior vs. Pierce, 31 Fed. 625.

Tefft, Weller & Co. vs. Sternberg & Lowen-
herz, 5 L. R. A. 221, and notes.

Tuck vs. Manning. 5 L. R. A. 666, 22 N. E.
1001.

Martin vs. Shannonhouse, 203 Fed. 517.

Reinhold vs. Olof Hannson, 139 Ill. App. Ct.
Rep. 334.

First National Bank vs. Londonderry Mining
Co. 114 Pac. 313.

Corbitt vs. Farmers Bank of Delaware, 114
Fed. 602.

Gregory vs. Merchant's National Bank, 50 N.
E. 520.

Gregory vs. Boston Safe Deposit & Trust Co.
53 N. E. 889.

Jones vs. Merchants Nat. Bank of Boston;
Gregory vs. Same; Gregory vs. Boston Safe
Deposit & Trust Co., 76 Fed. 683.

Gregory vs. Boston Safe Deposit & Trust Co.
144 U. S. 665, 36 L. Ed. 585.

Freeman on Executions, 3rd Ed. Sec. 135, P.
606 Sec. 129.

Herman on the Law of Executions, Sec. 173.

VIII

The county treasurer and clerk of Coos County are subject to the orders of the Circuit Court of that county not to the orders of the District Court of the United States in this case. They had no power upon the demand made upon them to pay out any money deposited with them without an order of court. If they had they would have been liable to an action by Coos county or a tax payer. Officers of Coos county ready to obey the orders of the court having control of the fund cannot be harrassed by suits in another forum.

Craig vs. The Governor, *supra*.

Gregory vs. Boston Safe Deposit & Trust Co.,
76 Fed. 683.

IX

The cases cited above in Points and Authorities

VII, in themselves, effectually dispose, we believe, of every theory which can be advanced by the Menasha Wooden Ware Company for a recovery in this action. The court has no jurisdiction to try this case. Hereafter is found a complete discussion by the judges of the cases cited herein.

X

Furthermore, plaintiff has mistaken his remedy in bringing an action for money had and received. At 3 Sutherland on Pleading and Practice, Sec. 5039, it is said: "An action will lie to recover a sum certain whenever one has the money of another, which he in equity and good conscience has no right to retain. If he knows it belongs to another and knows it is his duty to pay is over, he may be sued for money had and received." In this case, there is nothing in the pleadings to show that Coos county has any money of the plaintiff, nothing to show that Alfred Johnson, Jr., Sheriff has any money of the plaintiff, nothing to show that Robert R. Watson, County Clerk has any money of the plaintiff. The complaint further shows that the money received by Dimmick the county treasurer was received from an officer of the court, the clerk. The privity between Dimmick and the court is the only privity shown. And likewise the privity between the banks and Dimmick is the only privity shown.

27 Cyc. 857, 859.

XI

Where money is paid to a person who receives it with a good conscience and uses no deceit or unfairness in obtaining it, assumpsit for money had and received will not lie to recover it.

27 Cyc. 849.

XII

The law never implies a promise to pay unless duty creates the obligation and more especially it never implies a promise to do any act contrary to duty or contrary to law. The law will not imply a promise by a public officer to pay money in his hands as such officer twice, nor to pay it to a private party in a case where the law requires him to pay it into the public treasury, and he has complied with that requirement.

Cary vs. Curtis, 3 How. 236, 249, 251, 11 L. Ed. 576.

Barr vs. Craig, 2 Dall. 151, 1 L. Ed. 327.

Rapalje vs. Armory. 2 Dall. 51, 54, 1 L. Ed. 285.

The Collector vs. Hubbard, 12 Wall. 1, 12, 20 L. Ed. 272.

XIII

Suppose this court should give a judgment to the plaintiff against the defendant T. M. Dimmick and the bank in this case. Then when the mandate

came back from the Supreme Court of the United States in the case of Southern Oregon Company vs. W. W. Gage, the county should intervene and petition the court for an order applying the money deposited on the taxes due the county on the lands of the Southern Oregon Company and the court should enter a judgment and order directing the Treasurer and the Bank to pay the money over to the Sheriff to apply on delinquent taxes, what then? The mere statement shows that under the cases last cited that an action for money had and received will not lie against the defendants.

XIX

Money paid into court is an admission that the amount paid in is due on some contract or other.

9 Ency. of Plead. & Prac. 736, 735.

Brown vs. Feeney, 54 The Weekly Reporter 445.

94 Law Times Rep. N. S. 1906, p. 463.

Hosmer & Another vs. Warner, 73 Gray's Rep. 186.

Deposits in Court, Standard Cyclopedia of Procedure.

XV

There is a misjoinder of parties defendant in this case.

Cowart vs. Fender, American Annotated Cases, 1913A, p. 932.

Note to same, page 935.

ARGUMENT

It appears from the averments of the plaintiff's amended and Supplemental Complaint that the Southern Oregon Company, the assignor of the plaintiff paid to the County Clerk of Coos County, Oregon, and who was ex-officio Clerk of the Circuit Court of Coos County, Oregon, the sum of money alleged in the suit of the Southern Oregon Company vs. W. W. Gage as Sheriff and Tax Collector of Coos County, pursuant to the averments of the complaint of the Southern Oregon Company, and an order of Court made and entered in said suit, a copy of which order it set forth on pages nine and ten of the transcript of record of Plaintiff in Error. From this transcript it appears that the Southern Oregon Company owned, or claimed to own certain lands in Coos County Oregon upon which the taxes levied by the County were delinquent, and this Company, fearing that the lands might be sold for taxes by the County and not desiring to pay the taxes to the County while litigation was pending with the United States which sought to forfeit the title to all said lands and revest the same in the Government, brought the said sum of money into Court pursuant to the order above mentioned. This money was delivered by the Clerk of Coos County to the Treasurer of Coos County who has deposited the same in the defendant bank. The defense of the Defendants in

Error in this case is that the Circuit Court of Coos County Oregon has jurisdiction of this fund which is a deposit in court to the exclusion of every other court, secondly that an action for money had and received will not lie against defendants for this money, and thirdly, there is a misjoinder of parties defendant.

Section five of Chapter 273, General Laws of Oregon, 1913 provides as follows:

“It shall be the duty of all public officers excepting clerks of school districts, having and holding in their possession or custody, public funds or money in trust for any person, by virtue of their office, or any money held in custodia legis, to, as soon as practicable pay the same over to the county treasurer, if the same be held by a county officer, or to the State Treasurer, if the same be held by a State officer. All moneys so paid over to the county treasurer, as aforesaid, or to the State Treasurer, as the case may be, shall be paid out by the county treasurer as the case may be, in accordance with the order of the court if said money is held in custodia legis, or to the persons to whom said money properly belongs, if otherwise held.”

California has two similar statutes, Sec. 573 of the Code of Civil Procedure, and Section 2104 of the same code. In the case of *Agoure vs. Peck*, it ap-

beared that Agoure was defendant in an action brought by one Lewis and brought into court and rendered \$1000 in the form of a certificate of deposit with the clerk to the plaintiff. The clerk kept the certificate for a time and then deposited it with the county treasurer who neglected to have it cashed. The bank on which the certificate was drawn became insolvent and the treasurer was sued on his official bond and the judgment of the lower court holding the treasurer liable was affirmed. The supreme court said:

“When the treasurer received this certificate of deposit, under the terms of the judgment of the court, he could only receive the same as money, and it was his plain duty to have reduced the money, certified to be payable upon the presentation of the certificate, to his possession and to have safely kept the same until disbursed under authority of law. Failing to do this, he was guilty not only of a violation of the law, but of gross negligence in the management and care of this property. . . . His retention of the certificate of deposit, payable upon demand, was in legal effect but a loan to the bank of the money in his possession, a thing which by law he is prohibited from doing, and he cannot be heard to excuse himself upon the ground that he acted in good faith, believing the bank to be solvent.”

Page 708, Volume 121 Pac. Rep.

5 Ruling Case Law. p. 629 cites as follows:

“The clerk of a court as a public ministerial officer is answerable in a civil action for any act of negligence or misconduct whereby damages results to the party complaining, and this liability extends not only to his own acts but to those of his deputies performed within the scope of their official duty. The principle is unquestioned that public officers should be held to a faithful performance of their official duties, and made to answer in damages to all persons who may have been injured through their malfeasance, omission or neglect, to which the persons injured have in no respect contributed, and the courts uniformly apply this law to the negligence, carelessness and misconduct of clerks of courts.”

Note in Volume 7, Standard Encyclopedia of Procedure, 157.

“Generally speaking the liability of the clerk and his bondsmen for a loss of the fund in his keeping depends on the rule of the particular jurisdiction respecting the measure of liability of public officers for moneys in their hands. Thus, we find doubt expressed as to any liability on the ground that it is not public money (*Rhea vs. Brewster*, 130 Ia. 729, 107 N. W. 940), while in other jurisdictions the rule of liability as in cases of bailment is upheld (*Wilson*

vs. People, 19 Colo. 199, 34 Pac. 944). But in some states the liability is absolute. Northern Pac. R. Co. vs Owens, 86 Minn. 188, 90 N. W. 371."

Burke vs. Trewitt, 1 Mason 96, 4 Fed. Cas. No. 2163:

"In respect to property in the custody of officers of the court, pending process, they are undoubtedly responsible for good faith and reasonable diligence. If the property be lost or injured by a negligent or dishonest execution of their trust, they are liable in damages; but they are not, of course, liable, because an embezzlement or theft is proved. They must be affected with culpable negligence or fraud, and such is the confidence the court places in its officers that perhaps the proof of such negligence, or fraud, ought to be thrown on the other party."

DEFINITIONS OF CUSTODIA LEGIS

Custody of the law. 12 Cyc. 1024.!

In the custody of the law. Bouvier's Law Dictionary, Rawle's Third Rev. Vol. 1, p. 741.

In the custody of the law

Black's Law Dictionary, (2nd Ed.) Citing:
Stockwell vs. Robinson, 32 Atl. 528.

In the custody of the law.

Shumaker and Longsdorf, Cyclopedic Law Dictionary.

Property lawfully taken by authority of legal process is in the custody of the law.

Gilman vs. Williams, 7 Wis. 329, 334, 76 Am. Dec. 219.

Weaver vs. Duncan, 56 S. W. 39, 41.

Property legally in the hands of a receiver is in custodia legis.

Weaver vs. Duncan, 56 S. W. 39, 41.

In re Receivership of New Iberia Cotton Mill Co. 33 S. 903, 904.

A thing is in custodia legis when it is shown that it has been and is subjected to the official custody of the judicial executive officer in pursuance of his execution of a legal writ, and where property attached is sold under order of the court and attachment is dissolved, the proceeds are in custodia legis.

First Nat. Bank vs. Livingood, 109 Pac. 987, 988 (Kan.)

Property levied on remains in custody of the law.

August vs. Gilmer, 44 S. E. 143.

Hagan vs. Lucas, 10 Pet. 411, (35 U. S.) 9 L. Ed. 470.

The filing of a petition in bankruptcy and the adjudication thereon operated to place the property of the bankrupt in the "custody of the law."

Moore Mfg. Co. vs. Billings, 80 Pac. 422, 424, 46 Or. 401.

One charged with crime and at large on bail is constructively in the custody of the law.

Netograph Mfg. Co. vs. Sorugham, 90 N. E. 962, 963, 197 N. Y. 377.

27 L. R. A. N. S. 333, 134 Am. St. Rep. 886.

Custodia legis involves the actual domination over some objective thing by the court. It may be corpo-

real or incorporeal, but it is not a controversy, a question, or an inquiry.

Troll vs. City of St. Louis, 168 S. W. 167, 178.

Property in hands of receiver is in custodia legis.

Porter vs. Sabin, 37 L. Ed. (U. S.) 815, citing cases.

FARMERS LOAN & T. CO. vs. LAKE STREET ELEVATED R. CO. 44 L. Ed. 667. 671, 177 U. S. 52, 62.

The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of other co-ordinate jurisdiction from exercising a like power. . . . Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and state courts.

DISTRIBUTION OF MONEY IN CUSTODIA LEGIS

13 CYC 1038.

“The court in which a fund has been deposited has power to order distribution of it, and when jurisdiction is once obtained it is not lost either by the abatement of the suit or by the dismissal of the bill.”

13 CYC 1038.

“The court in which the fund is deposited has exclusive jurisdiction of the question of the right to the moneys, and all claims against the deposit must be asserted there.”

WRIGHT vs. MITCHELL, 18 Vesey Jrs Rep. Sumner's Edition, 293. The bill was filed on behalf of the plaintiff and all other creditors of an intestate for an account, and to set aside the assignment of a lease by the intestate to two of the defendants in trust for a third. The tenants of the premises, being also made parties, paid the rent into court. The bill having been dismissed for want of prosecution, a motion was afterwards made by the assignees of the lease, that the money in Court should be paid out to them.

The Order was made; but the Register declining to draw it up, on the ground that, the Bill having

been dismissed, the Court had no jurisdiction, the motion was repeated. The Lord Chancellor (Eldon) said, the Court had jurisdiction to make an order for payment of the money out of Court, and directed the order to be drawn up.

STURDIVANT vs. REESE, 111 S. W. (Ark.) 261.

“It would be anomalous to say that a court loses power to require its commissioners to distribute funds which have come into their hands as officers of the court, and by virtue of the orders of the court. Payment under orders of the court to a commissioner or other functionary appointed by the court is equivalent to a deposit in court, and the court has exclusive jurisdiction to order a distribution.”

7 Standard Encyclopedia of Procedure. p. 169.

“The rights of claimants to a fund deposited in court cannot be determined in another suit even after final decree.”

Citing:

Gregory vs. Boston Safe Dep. & Tr. Co. 144 U. S. 665, 36 L. Ed. 585.

Corbitt vs. Farmers' Bank of Delaware, 114 Fed 602.

Allen vs. Gerard, 44 Atl. 592, 49 L. R. A. 351, 21 R. I. 467.

ID. p. 171.

“A fund paid into court cannot be withdrawn or distributed except upon the court’s order. Citing:

Hammer vs. Kaufman, 39 Ill. 87.

Walters-Cates vs. Wilkinson, 92 Ia. 129, 60 N. W. 514.

Boggs vs. Com. 76 Va. 989, following Osburn vs. U. S. 91 U. S. 474.

ID. p. 173:

“No other court has jurisdiction to determine any question pertaining to the distribution of the fund.” Citing

CRAIG et als. vs. THE GOVERNOR, for the Use of White, Adm. 43 Tenn. (3 Coldwell’s Reports), 244.

Syllabus. A fund in custodia legis and under the control and subject to the orders and decrees of the chancery court, cannot be paid out by the Clerk and Master of the court, to any one, except in obedience to the order of the court; and a party cannot resort to a different forum and recover of the clerk and master of the chancery court and his sureties, the money, and thus oust the chancery court of its jurisdiction of the same.”

4 ENCY. of U. S. Supreme Court Rep. p. 1170.

“The court which first acquires jurisdiction of a case has a right to retain it until the cause is finally disposed of, and its jurisdiction is not

subject to be ousted by court exercising a concurrent jurisdiction.”

ID. p. 1173.

“The rule that the court having possession of property has a right to deal with it to the exclusion of other courts of concurrent jurisdiction is of special importance in its application to state and federal courts. As between a state and federal court the one first seizing property has exclusive jurisdiction.”

ID. p. 1175. Where property is in the lawful possession of a state court, it cannot be seized by process issuing from a federal court.

ALLEN vs. GERARD, 79 Am. St. Rep. 816, (21 R. I. 467. 44 Atl. 592.) P. 817-818. Citing Cases.

“Public officials are charged with certain well defined duties, and the law prescribes the manner in which they shall be performed. If, while in the discharge of these duties, the officer is interfered with by some person who is a stranger to the proceedings, confusion and inconvenience will necessarily be the result, new complications will arise, and a multitude of suits be made possible where there should have been but one. And in order to avoid such inconvenience and confusion, the principle has very generally been established that ‘no person deriving his authority from the law, and obliged to execute it according to the rules of law can be hold-

en by process of this kind.' Here the money sought to be reached is in the registry of the court, and hence undoubtedly in the custody of the law. It was placed there in pursuance of the statute. The clerk of the court, as such, has no control over it, nor is he any way liable for it, except as the custodian of the court. He holds the money in his official capacity only, and can only pay it out as ordered by the court."

COVELL vs. HEYMAN, 111 U. S. 176.

A marshal of a court of the United States had possession of property by virtue of a levy under a writ of execution issued upon a judgment recovered in a Circuit Court of the United States. An action of replevin for the property was brought against him in a state court and taken on writ of error from the decision of the Supreme Court of the state to the U. S. Supreme court. The United States supreme court after discussing *Freeman vs. Howe*, 24 How. 450 and *Taylor vs. Carrol*, 20 How. 583, says:

"The point of the decision in *Freeman vs. Howe*, *supra* is that, when property is taken and held under process, mesne or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued, for the purposes of the writ; that the possession of the officer cannot be disturbed by process from any State court, because to disturb that possession

would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person, not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds, from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, State or Federal, having jurisdiction over the parties and the subject matter. And vice versa, the same principle protects the possession of property while thus held, by process issuing from State courts, against any disturbance under process of the courts of the United States; excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and the laws of the United States." P. 179. 160.

The court then discusses subsequent decisions by that court, and quotes the following opinion from Mr. Justice Miller:

"That principle is that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under

its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises." P. 180.

The court says further:

"Here it will be perceived that no distinction is made between writs of attachment and executions upon judgments, and that the principle embraces both, as indeed both are mentioned as belonging to the same class elsewhere in the opinion." p. 181.

Again:

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States it is something more. It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they coexist in the same space, they are

independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues. 'The jurisdiction of a court,' said Chief Justice Marshall, 'is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised.'" . . . Pages 182-183.

"Property thus levied on by attachment, or taken in execution, is brought by the writ within the scope of the jurisdiction of the court whose process it is, and as long as it remains in the possession of the officer it is in the custody of the law. It is the bare fact of that possession under claim of and color of that authority, without respect to the ultimate right, to be asserted otherwise and elsewhere, as already sufficiently explained, that furnishes to the officer complete immunity from the process of every other juris-

diction that attempts to dispossess him." p. 184.

SENIOR et al. vs. PIERCE et al. 31 Fed.
625.

Cause was before the court upon the application of the plaintiff to attach Frank Pierce for contempt. The alleged contempt consisted in the refusal of Pierce to deliver to the U. S. Marshal, in obedience to the command of a writ of replevin issued in said cause, certain spirituous liquors, valued at about \$6000, which said Pierce had seized under the Iowa liquor law, under a warrant issued from a justice of the peace court.

The court said:

"We live under two separate and distinct governments. In this respect our situation is peculiar, since there is not, perhaps, under the sun, another people subject to the rule of more than one government. While neither of the governments over us is absolutely sovereign, each is clothed with certain sovereign powers, to be exercised within the limits of the fundamental law, and each is supreme within its proper sphere. One of the most difficult problems in our polity has always been to define the limits of our two governments and keep each in its true orbit. There are, in this dual system, two judicial organizations, for the most part quite inde-

pendent of each other. With very few exceptions there is no appeal from one of these jurisdictions to the other. They have no judicial power over each other; they cannot revise each other's judgments. There is no common superior to bring their decisions into harmony, and prevent conflict between them. In most cases, the courts of the two jurisdictions exercise concurrent judicial power. They are employed in administering justice, and in enforcing the same laws, within the same territorial limits, over the same persons and subject matter. It is manifest that in so complex a judicial system there must arise, with respect to both persons and property, many causes of conflicting jurisdiction; and it were needless to dwell upon the intolerable mischiefs which must have resulted from such conflicts if they had not been averted by a wise and timely course of judicial decisions. The danger of such conflicts has been from the first imminent; and yet, the courts, state and federal, have for nearly a century exercised their judicial functions side by side, over the same people and territory, in cases mostly of concurrent jurisdiction, with but little discord, warring or conflict.

“How has this most desirable harmony been attained? We owe it beyond doubt to the wisdom of the supreme court of the United States in planting deeply in our legal system the principle that where a court of either jurisdiction

has, by legal process, custody of persons or property, the courts of the other jurisdiction shall not attempt to wrest such persons or property from the court first obtaining possession of the same. Again and again has this principle been laid down by the supreme court, as will seen by the authorities cited below. That court has put its decision upon the ground that the possession of the officer of a court under legal process is the possession of the court, and that an attempt to wrest persons or property from the custody of the officer is an invasion of the jurisdiction of the court." Citing cases. Pages 626-627.

The court then cites and quotes from decisions of the U. S. supreme court, and continues:

"Since, then, property in the hands of an officer of a court under legal process is to be considered as in the custody of the court, the officer would clearly have no right to surrender it without the order of the court, to whom he owes obedience; and therefore an attempt of an officer of an alien jurisdiction to take the property out of the possession of the officer holding it must, inevitably, either prove futile or lead to a forcible collision. Would the officer in possession be justified in surrendering the property at the mandate of a court foreign to him, and without any power whatever to give him protection against the or-

ders of his own court? Would it not be his duty to resist by force the attempt of an officer of a different jurisdiction to take the property from his custody? Can the officer in possession be required to determine for himself, in advance of the judgment of his own court and of the court from which the writ of replevin issues, the right of the plaintiff suing out a replevin from an alien jurisdiction to the property in dispute, and the authority of the officer serving the writ of replevin to seize and take the property? And can an officer be adjudged to be in contempt, and punished for his disobedience to the process of an alien jurisdiction, while acting in obedience to the command of his own court, in refusing to deliver up property which he holds as the mere custodian of that court?"

"The state and federal courts of original jurisdiction are independent of each other. They are equal in power and dignity. The courts of one jurisdiction have no authority or right whatever to command or coerce the courts of the other jurisdiction. How, then, could the federal court take property from the custody of the state court, against its consent, without the use of actual force? But if one jurisdiction may use force, why not the other? Why, if the federal court may exert force to take property from the possession of a state court, may not the latter, in its turn, wrest property from the

federal court by the same means? Nothing is more evident than that whatever a federal court may lawfully do to take property from the state court the latter may also, in like circumstances, do to withdraw property from the possession of a federal court. This power, if it exists, must be reciprocal. It cannot, in the nature of things, be one-sided and exclusive in the federal courts. It would be most unreasonable for the federal courts to assert and exercise a power of seizing property in the custody of a state court, and deny to state courts of co-equal power authority to interfere in like manner with the possession of property held by a federal court. The federal tribunals would therefore but for the principle of mutual non-interference, be exposed to an invasion of their jurisdiction by the state courts, which they are certainly neither ready nor willing to permit. The evil consequences flowing from the interference of the two jurisdictions with their respective rights of possession would by no means end with the scenes of violent collision which must inevitably occur. The taking of the possession of the property by one court from another would not in the slightest degree affect the jurisdiction of the latter to hear and determine the controversy between the parties. The invaded court could not be prevented from proceeding to judgment upon the subject-matter of the suit. Hence would inevitably arise divers and con-

flicting judgments by two courts of concurrent jurisdiction upon the same controversy, and property, within the same territorial limits, without any common superior tribunal to settle and adjust the conflicting rights and titles thus created. Thus, by the judgment of a court of one jurisdiction, the right of property might be established in one suitor, while, by the decision of a court of the other jurisdiction, the title might be adjudged to his adversary; and the right of either party would be made to depend upon the forum in which it should happen to be challenged.....The case was appealed from the judgment of the justice of the peace to the state district court, and the property is now, therefore, in the custody of that court. How is this court to obtain possession of it without the consent of the state district court, unless by a resort to force to wrest it from the custody of the officer of that court? Suppose we decide that the proceeding was irregular, and the seizure without warrant of law, and void, and suppose the state court shall hold just the contrary, how is the conflict of judgment between us to be settled? And, if one court or the other shall not yield, how is a collision of force to be avoided? Why should the state court, which first got possession of the property and the controversy, yield to the claim of jurisdiction by this court? By what right, law, or authority, can this court claim superiority to the state

court, or any paramount competency, to hear and determine the matter at issue?

“Inasmuch as the very purpose of non-interference is to prevent a conflict between the two jurisdictions, I can see no difference in the application of the principle whether the question to be decided by the two courts is one of jurisdiction, or of mere property right, the jurisdiction being conceded. The state court must needs decide for itself whether or not the seizure proceeding was illegal. There is no other tribunal with competent authority to decide this question for the state court. If the federal court may decide the question of the regularity of the seizure and jurisdiction adversely to the state court and proceed to take the property from its custody by force, why may not the state court reciprocally, in any parallel case, decide the same questions when property is in our custody, and proceed by writ of replevin to dispossess the marshal? But assuredly, if the federal court were in possession by legal process, it would not permit the state court to decide the question of jurisdiction and wrest the property from our control. The only safe and legitimate course for the suitor is to pursue his remedy by some proper ancillary proceeding in the court first obtaining jurisdiction, and take his appeal, if not satisfied, to the final justice of the supreme court of the state, or of the United States, as the case may require. It will not do for the

suitor to assume that he cannot obtain justice in one jurisdiction or the other. But in all events, it is infinitely better that injustice should be done and suffered in particular cases than that a course of proceeding should be sustained fraught with all the evils of conflicting judgments and forcible collisions between the two independent jurisdiction." P. 626-632.

TEFT WELLER & CO. vs. STERNBERG & LOWENHERZ 5 L. R. A. 221,—Fed,—

Bills by complainants against defendants, an insolvent firm, and J. G. Barnes, sheriff of Muscogee County, and creditors of the firm, for an injunction, receiver, etc. to take charge of the assets of said firm then in the custody of a state court, and in charge of the said sheriff, an officer of the court. The court after citing and quoting from the decisions of the U. S. Supreme court says:

"In a case like that before the court, the court first taking jurisdiction of the substance of the litigation should dispose of all the incidents. It is true that there will be, doubtless, a balance of some amount in the hands of the sheriff after the more important liens there depending are satisfied; and, this court might be justified, by the letter of the law, in appointing a receiver, to whom the sheriff would account for such balance. This, however, would not accord with that spirit of absolute reserve,

which in the matters of concurrent jurisdiction, should mark the action of the courts of the United States toward the state courts. The superior court of Muscogee county has the same power to dispose of all the matters in litigation that would obtain here. It is therefore presumably unnecessary, were it otherwise seemly and appropriate, to go forward and grant the extraordinary relief sought." Page 225.

TUCK vs. MANNING et al and Tuck, Petitioner in HOLMES vs. SAME and SOPER vs. Same, 5 L. R. A. 666, (22 N. E. 1001.)

Tuck, the plaintiff and petitioner, when he filed his bill and petitions, held a promissory note signed by Manning, and he brought the suit in equity against Manning and John Noble, the clerk of this court, to reach and apply to the payment of this note the right, title and interest of Manning in certain sums of money which had been paid into court by the plaintiffs in two suits named in the bill, in which Manning is a party defendant. The plaintiff also filed petitions in these two suits asking that the payment of money to Manning by the clerk might be stopped, and that he might have such relief as he was entitled to. These sums of money were and are held by Noble as clerk, subject to the order of the court in the suits respectively in which they were paid in; and decrees have been entered in the suits, ordering portions of the sums to be

paid to Manning, but the payments to him have not yet been made. Some time after the bill and the petitions were filed the plaintiff recovered judgment in the supreme court of New York against Manning on his promissory note in a suit which was pending when the bill and petitions were filed, and he was permitted to amend his bill by setting out this judgment. The court, by Field, J. says:

“The custody which Mr. Noble has of the money is the custody of the court and he must obey the orders of the court made in the suits respectively in which the moneys have been deposited, and he cannot be made a party to independent proceedings either in this court or in any other whereby the disposition to be made of the moneys can be affected or controlled. *Columbian Book Co. vs. De Golyer*, 115 Mass. 67; *Jones vs. Jones*. 1 Bland. Ch. 443; *Wilder vs. Bailey*, 3 Mass. 289; *Drake, Attachment. Sec. 257.*” Page 666.

D. B. MARTIN CO. vs. SHANNONHOUSE, 203 Fed. 517.

Motion made by plaintiff to order the payment to it of money in the registry. It appears from the record and affidavits filed: That at the October term, 1912, of this court, at Elizabeth City, Plaintiff recovered judgment against the defendant for the sum of about \$2100. That on or about the 16th day

of January, 1913, defendant paid to the deputy clerk at Elizabeth City the full amount of the judgment and the costs taxed against him. That soon after the payment of said amount the sheriff of Pasquotank county served upon the deputy clerk a warrant of attachment sued out of the superior court of Perquimans county in an action pending in said court, wherein the defendant H. T. Shannonhouse is plaintiff, and plaintiff D. B. Martin Company is defendant. The money was in his hands at the time said warrant was served upon said deputy clerk. It had not been deposited by him. He made with the sheriff an arrangement that the money should be deposited in the bank in the joint name of himself and said sheriff for the purpose of protecting both officers and to await the determination of the attachment proceedings. Plaintiff demanded of said deputy clerk that he pay to it the said money, which demand was refused for the reason that the same had been attached in his hands. Plaintiff, upon notice to defendant, moves the court to order the deputy clerk to pay over to it the said money notwithstanding the service upon him of the warrant of attachment. The court says:

Connor, District Judge.

“Before disposing of the question as to whether the money in the hands of the clerk was subject to attachment, it will be well to

direct the attention of the clerk and his deputies to the statutory provisions prescribing their duty in regard to funds coming into their hands by virtue of judgments or decrees of the court:

“ ‘All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court shall be forthwith deposited with the Treasurer, an assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court.’ Rev. St. 995, U. S. Comp. St. 1901, p. 711, 5 Fed. 813. Ann. 70, Fagan vs. Cullen (c.c.) 28 Fed. 843.

“It is further provided that:

“ ‘No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in, or account from which, it is drawn.’ Id. Sec. 996.

“It was the uniform custom of the several clerks in this district, and since the enactment of the Judicial Code, is now the custom of the clerk and his deputies, to immediately deposit money coming into their hands as directed by the statute. The deputy clerk at Elizabeth City, supposing some other and dif-

ferent duty under the circumstances, deposited the money to the joint credit of the sheriff and himself. In this he was in error. Under any circumstances, assuming that the money paid to him in satisfaction of the judgment was subject to attachment, or himself to garnishment, the sheriff had no authority to take the money from his possession, or interfere with him in the discharge of his official duty, as prescribed by the statute An order will be drawn directing the deputy clerk to forthwith deposit the amount received by him from defendant Shannonhouse on account of the judgment recovered by the plaintiff herein in the depository designated for that purpose. A copy of said order delivered to the bank in which it is now deposited will be sufficient authority for the withdrawal of the amount and its deposit as herein directed The question then arises, Is the money deposited in the depository designated by law to the credit of the court subject to attachment by the sheriff of Pesquotank county? The decision of this question does not call into controversy or involve the validity of the process of the state court. This court has not any such authority or power.

“The sole question is whether the money in the custody of this court is subject to be attached or this court’s control of it, in any degree, affected by the action of the sheriff in

respect to the warrant of attachment. The warrant did not direct the sheriff to levy upon, or attach, this specific money, but only the property of the defendant in his county. The power and duty of a court to decide for itself whether property in its possession or under its control can be taken from it by process issuing from another court is essential to its right and duty to administer to its suitors such remedy, as according to the law they may be entitled, and to enforce its judgments. Chief Justice Marshal, in *Wayman vs. Southard*, 10 Wheat. 1, 6 L. ed. 253, says:

“ ‘The jurisdiction of a court is not exhausted by the rendition of its judgment, but continued until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment, in which jurisdiction is to be exercised.’ ”

“It is therefore generally held that property in *custodia legis* is not subject to attachment. 3 Stand. Enc. Pro. 280. The question presented here has been decided in a well considered opinion in which all of the decided cases are cited, by District Judge Waddill, of the Eastern District of Virginia. In *Corbitt vs. Farmers Bank* (C. C.) 114 Fed. 602, he says:

“ ‘The position taken by counsel for complainant, that the court, having entered its final

order in respect to the money in question, had exhausted its jurisdiction over the same, and that such funds then remain subject to seizure by attachment or other legal process, as any other property belonging to defendant bank, is equally fallacious. A conclusion in favor of parties litigant, to any controversy, would be barren of good, if the court rendering the decision was powerless to cause its decrees and orders to be put into operation and duly executed; and such a result as to money in the court's own registry would indeed, leave it in a helpless and pitiable plight.'

"As clearly and forcibly pointed out by Judge Waddill, to hold otherwise would result in unseemly conflicts between state and Federal courts, involve their officers and suits in difficult and frequently doubtful questions and result in endless confusion. The courts generally hold that to permit funds in their possession to be subject to attachment would be contrary to public policy. *Clark vs. Shaw*, 26 Fed. 356; *In re Forsyth*, 78 Fed. 296.

" The statute of North Carolina directs that money paid to the clerk shall be paid by him 'to the party entitled to receive it,' whereas, money paid to the clerk of the Federal court is to be deposited by him in the depository designated to the credit of the court, and can only be drawn *out by the order of the court. It remains under the control of the court, and is*

not subject to the orders or process of any other jurisdiction. The deputy clerk should not have cancelled the judgment. His sole authority in the premises was to receive the money and deposit it, as directed. The application and disposition of it could be made only by the court."

Pages 518-521.

Reinhold vs. Olof Hansson. 169 Ill. App. Ct. Rep. 334.

Reinhold filed his bill in the Superior Court against Hansson and others to foreclose a trust deed. During pendency of suit, money due was paid into court. Thereupon the suit was dismissed without mentioning to whom the money should be paid and plaintiff appealed.

The Court said:

"Complaint is made because the decree fails to direct the payment of the money to appellant. This complaint, made as justifying this appeal, is more chimerical than substantial. The money, having been paid to the clerk with the knowledge and sanction of the court, became a fund custodia legis, to be paid out upon the order of the court. Hammer vs. Kaufman, 39 Ill. 87, Ferguson vs. Sutphon, 8 Ill. 547.

"Upon motion in the court below appellant might readily have procured an order directing

the clerk to pay the money to him, and thereby avoided this appeal. If the attention of the court had been directed to the failure of the decree to award the payment of the money to appellant, the decree would, doubtless, have been so drafted as to accomplish that result."

Page 336.

First Nat. Bank vs. Londonderry Mining Co.
114 Pac. (Col.) 313.

In a suit concerning the ownership of ores, it was ordered that the proceeds of such ores be placed in the registry fund of the court, and that the clerk deposit the fund in some bank which should be required to give a bond. Thereafter an order was entered that the moneys on deposit be equally divided between the parties, and the parties filed a petition which resulted in an order against the bank to show cause why it should not pay a specified sum. The bank filed an answer, and a trial was had which resulted in the entry of judgment against the bank. The bank contended that there was no jurisdiction, in that it was not a party to the action, and not bound by any orders others than the one to show cause and that the action must be on the bond of the bank, and its sureties, wherein a summons must issue in the name of the people and that there was no statute authorizing a judgment.

The court said:

"The first question necessary to determine pertains to the jurisdiction of the court. It is

claimed that the bank was not a party to the action, and hence was not bound by any orders of the court made in the case other than that to show cause; and, further, that if funds claimed by both parties to the suit were deposited in the bank, it was the direct interest of such parties as against the bank and which can only be enforced by an independent action upon their part. It is further contended that such action must be upon the bond of the bank and its sureties, wherein a summons must issue and run in the name of the people, etc. and that there is no statute authorizing a judgment, or decree, or motion, etc. These assignments are not well taken. If it is true, as alleged, that there are no statutory provisions regulating or providing for judgment by motion or citation in this class of cases, none are needed. It is a jurisdiction existing and which has been exercised from time immemorial. The funds borrowed were in the custody of the court and the bank which came into court and borrowed this money with knowledge of the conditions under which it was acquired made itself a quasi party to the action and was subject to the orders and decrees of the court; and is estopped to deny that it had not become such a quasi party to the suit. In such case it was not necessary that a separate suit should be brought; in fact, under repeated decisions of the federal courts, and in some states where the question has been passed upon,

it is held that no separate or outside suit could have been brought to disturb these funds.”

Pages 314-315. Citing:

Corbitt vs. Farmers Bank et al, 114 Fed. 602.

Jones vs Merchants Nat. Bank, 76 Fed. 683,
35 L. R. A. 698.

Allen vs Gerard, 21 R. I. 467, 44 Atl. 592, 49
L. R. A. 351, 79 Am. St. R. 816.

Tuck vs. Manning, 150 Mass. 211, 22 N. E.
1001, 5 L. R. A. 666.

“In addition, the bank appeared and defended the action, of which it had proper notice. A citation was issued and served upon it to appear and show cause why it should not pay this money. This it did by written pleadings the same as though summons had been served upon it. A trial was had upon the very issue herein involved in which it appeared and offered its evidence and presented arguments by its counsel upon the merits of the controversy. None of its rights in this respect are complained of. The practice was complied with the same as though it had been a party to the original case. For the purposes of the disposition of these funds pertaining to which the bank was a quasi party to the action, the court had jurisdiction to render a judgment against it. Uhl vs. Vohlmann, 52 App. Div. 455, 65 N. Y. Supp.

197, Vaughn vs. Tealey, 39 S. W. 868, Fisher vs. Cunningham, 58 S. W. 399.' Page 315.

CORBITT VS. FARMERS BANK OF
DELAWARE et al. 114 Fed 602.

"The question presented by the motion to abate the attachment in this cause is whether moneys paid into court pending litigation in regard thereto, and placed by order of the court in its registry or some other designated depository, pursuant to law are the subject of attachment enjoining from another court. This question is one of importance, as it not only affects the orderly administration of justice in the several courts, but goes further, and tends, as in this case, to thwart and annul the carrying out of the court's judgment, in a case fully litigated, with the parties in interest before it. Money paid into the registry of the court, pursuant to law, can only be withdrawn therefrom, by the very terms of the act of congress providing for the deposit 'by the order of the judge, or the judges of said court, respectively, to be signed by such judges, or judges, and to be entered and certified of record by the clerk.' When a court causes funds to be so placed in its registry, they are to the credit of the court itself, there placed and held, to the end that its decrees and orders in respect thereto may be obeyed and carried out in accordance

with its judgment rendered; and no court, other than one having a supervisory power over the acts of such court, can by any act of its own, or any decree, order, or process emanating from it, except with its leave, assert any claim to, or secure any right in or lien upon such funds, so long as the same remain under its control. To entertain a contrary doctrine to this would not only work untold mischief and delay in legal proceedings, but would result in innumerable conflicts between the courts themselves; and the consequence would be that funds once paid into court with a view of having the rights of parties litigant thereto adjusted and determined, instead of being disposed of by the termination of the particular controversy, would be involved in an endless chain of litigation. This subject has been before the courts, state and federal, too frequently to admit now of serious cavil or doubt." Page 603-604.

"The position taken by counsel for complainant, that the court, having entered its final order in respect to the money in question, had exhausted its jurisdiction over the same, and that such funds then remain subject to seizure by attachment or other legal process, as any other property belonging to the defendant bank, is equally fallacious. A conclusion in favor of parties litigant to any controversy would be barren of good, if the court rendering the decision

was powerless to cause its decrees and orders to be put into operation and duly executed; and such a result, as to moneys in the court's own registry, would, indeed, leave it in a helpless and pitiable plight."

To same effect see *Shelton vs. Wolthausen*, 69 Atl. 1030, 1031.

GREGORY vs. MERCHANT'S NATIONAL BANK, (Mass.) 50 N. E. 520.

Bill in equity to obtain from defendant bank a sum of money received on deposit, amounting to \$18,820, which was the proceeds of a promissory note to which the plaintiff contends that he was entitled. The note was claimed by other parties. A suit at law upon it was pending in the circuit court of the United States for the First circuit, and a suit in equity was pending in the same court to determine the rights of the respective claimants to it. There was also a submission to arbitration in pais, by the parties to the suit in equity, of the questions arising in that suit, and on award under the submission, the effect of which was in dispute. In this situation it was agreed by the claimants of the note that it should be delivered to John G. Stetson, who was at that time the clerk of the circuit court of the United States for the First circuit, to be retained by him subject to the joint order of the counsel of the respective claimants. Afterwards an order was entered by the court in said suit in equity, requiring

Mr. Stetson to file the note in the action at law above referred to, and directing the maker of the note, the defendant in that action, upon and after the entry of the judgment therein, as follows: "To pay into the registry of this court the amount of said judgment . . and that said amounts be held subject to the rights of the parties claiming said note, and to abide the decision of the court in this cause." Thereupon Mr. Stetson filed the note in court in accordance with the order. Judgment was entered in the action at law upon the note for the sum of \$18,879.96, and the defendant in the action paid into court that sum in satisfaction of the judgment. On the same day, Mr. Stetson, the clerk of the court, took the money and deposited it with the defendant bank and received from the bank a pass book in the usual form, which showed that the money was deposited by the court in case No. 2435, Jones vs. Swift, which were the number and name of the action at law. All these facts are set out in the bill. A demurrer to the bill was sustained, and case appealed.

The court then cites Rev. Stat. of the U. S. Sec. 995, 996.

The court says:

"While the bill does not expressly state that the defendant bank is a designated depository of the U. S. and that the money was deposited by the clerk in accordance with his legal duty under the statute after the money had been paid into court, the averments of the bill warrant

other legal inference. It is well settled that the direct legal liability of a bank for money deposited subject to withdrawal by check is only to the depositor. *Carr vs. Bank*, 107 Mass. 45; *Bank vs. Millard*, 10 Wall. 152, *Bank vs. Dodge*, 124 U. S. 333. It is equally clear that if one seeks by a bill in equity to establish a trust in a deposit in a bank, and to set up a title adverse to the depositor, the depositor is a necessary party to the suit. To a suit in equity which has for its object the disposal of any trust fund, all known claimants of the fund must be made parties. *Williams vs. Bankhead*, 19 Wall. 563.

“The money claimed in this case was deposited by the circuit court of the United States and is held by the defendant bank subject to withdrawal only upon an order of one of the judges of that court. It is quite clear that no proper inquiry could be made in regard to the ownership of the fund without making the judges of the court parties. But the objection to the bill lies deeper than this. The money was paid into court under an order of court, and was held by the court in *custodia legis*. Whether the order under which it was paid was properly or improperly made cannot be determined upon a proceeding to obtain the money in another court. The circuit court, by virtue of the pending suit in equity, had jurisdiction of the subject and of the parties. No other court has jurisdiction of any question pertaining

to the disposition of the money which is held by that court. Claims upon the moneys are to be made in that court and to be heard and determined there. This was held in *Gregory vs. Bank*, 76 Fed. 683, 22 C. C. A. 483, a suit brought to obtain this same money. Any other doctrine would be at variance with the right of control of its own business which inheres in every court of justice, and would cause uncertainty and confusion in the determination of legal rights. It is plain that this suit cannot be maintained, because the judges of the United States court are not parties to it, and because this court has no jurisdiction to make them parties in a case of this kind, or to adjudicate upon questions which are properly cognizable only in that court. *Tuck vs. Manning*, 150 Mass, 211. 22 N. E. 1001, *Book Co. vs. De Golyer*, 115 Mass. 67. Whether the bill is fatally defective for want of other parties, on grounds intimated in *Gregory vs. Stetson*, 133 U. S. 579, 10 Sup. Ct. 422, another suit to obtain possession of the proceeds of this note, it is unnecessary to determine." P. 521-522.

**GREGORY VS. BOSTON SAFE DEPOSIT
IT & TRUST CO. 53 N. E. 889.**

Suit by Gregory against defendant. It appears that a suit in equity was pending in the circuit court

of the U. S. for the first Circuit involving the ownership of two promissory notes. One of these notes, which was for \$20,334.60, with interest matured; and a suit was brought upon it in said circuit court by agreement of the claimants, and was prosecuted to judgment by their respective counsel, acting jointly. The amount of the judgment, \$24,926.90 was paid into court, and was held in the registry in satisfaction of the judgment, for the benefit of the party to whom it should be decided the note belonged. Thereupon it was ordered by the court that this sum be transferred to the cause in equity, which was brought to determine the title to the note, to remain subject to the order of the court in that cause. Afterwards the plaintiff in the present suit filed in the equity cause a motion to have the money deposited with the Boston Safe Deposit and Trust Company so that it would draw interest. The court made an order to that effect.

On June 20th, 1896, a final decree was entered in the equity cause, that the remainder of the fund be paid to Mary H. Pike, the executrix of the original defendant, Frederick A. Pike, and on Sept. 21, 1896, it was "ordered that the following property in the registry of the circuit court in this cause, deposited, subject to the order of said court, in the Merchants National Bank of Boston, and in the Boston Safe Deposit & Turst Company, amounting in all," which included the deposit now in question, be paid over to said Mary H. Pike. The plaintiff contends that this court had no jurisdiction to make this order.

The court says:

“But we see no good grounds for this contention. The money came into the registry of the court in the cause in equity, apparently with the consent of all parties. It was deposited with the defendant, subject to the order of the court, upon the plaintiff’s motion. The defendant has lawfully paid it out in accordance with the order of the court and the defendant cannot now be charged with it in a suit brought in a state court. The doctrine stated in *Gregory vs. Bank*, 171 Mass. 67, 50 N. E. 520, and in another case pending between the same parties in 22 C. C. A. 483, 76 Fed. 683, is decisive of this case.”

JONES VS. MERCHANTS NAT. BANK
OF BOSTON et al.

GREGORY VS. SAME.

GREGORY VS. BOSTON SAFE DEPOS-
IT & TRUST CO. 76 Fed. 683.

These are three bills, the first of which was filed by Charles F. Jones against the Merchants National Bank of Boston, the clerk of the circuit court, and his predecessor in office; the second by Charles A. Gregory against the Merchants National Bank of Boston and another; and the third by Charles A. Gregory against the Boston Safe Depos-

it & Trust Company and another; complainants in each case claiming title to funds in the custody of the bank and trust company as depositaries of the circuit court and praying that the same be paid over to them.

The court after going into the question as to how the money came into the custody of the defendant banks says:

“Although, in response to the propositions of the appellants, we have thus gone into the details showing that these two funds came into the custody of the respective depositaries pursuant to orders of the court, yet we are not to be understood as now impeaching the broad proposition that the essential position would in all respects be the same if it appeared only that the funds had been transferred from the court to the depositaries by the act of the clerk, under color of authority from the court, so long as the act of the clerk remained without any disavowal by the court. The funds having thus accumulated in the respective depositories, the appellants, conceiving that they had an interest therein which had not been adjudicated to them, but without obtaining the leave of the court to proceed against them or the depositaries, and without any petition to the court asking leave to intervene in the usual way, filed these three bills, one against one of the depositaries, the present clerk of the circuit court, and his predecessors in office, one against the same deposi-

tary and a person in whose favor the circuit court has decreed an interest in the funds and the third against the other depository and also the same person named in the second. Each bill claims title to the respective funds, and prays direct relief against the respective depositories in the particulars that they may respectively be decreed to pay the respective funds to the complainants."....

"Our attention has been called to the want of parties, but we prefer to put our decision on such grounds as will protect the depositories of the federal courts in this circuit from all such attempts to harass them. We doubt not these bills were filed entirely in consequence of a zealous desire to seek a remedy for a supposed right, and with no purpose beyond that. Yet the occasion requires us, now to state at large why proceedings of this character are not tolerated by the law, but only to declare the rule, so that no one can hereafter excuse himself for not regarding it. The futility of all such bills is sufficient to defeat them, because, notwithstanding the pendency of one of them, the court having control of a fund may order the entire disposition of it summarily, thus leaving nothing for the bill to act on. A bill which can reach no result except by staying the ordinary and rightful exercise of the essential functions of the court is, by its character, so futile that it ought to be dismissed for that reason alone;

but it is enough to say that the rule that bills of this sort will not be tolerated is so fundamental, and so necessary to the full exercise of judicial functions, that the reasons on which it rests need not be further stated."

The court cites another phase of the case in *Gregory vs. Pike*, 77 Fed. 241.

GREGORY VS. BOSTON SAFE DEPOSIT & TRUST CO. 144 S. 665, 35 L. Ed. 585.

Suit was brought by Gregory and Jones against the Boston Safe Deposit and Trust Company and the Merchants National Bank and Mary H. Pike administratrix of Frederick A. Pike, deceased, to obtain the amount of a judgment on deposit with said bank and trust company. The bill was dismissed. 36 Fed. Rep. 408, 414. An appeal was taken to the United States Supreme court, the court after referring to the decree of the court below that the moneys in the hands of the defendants the Boston Safe Deposit & Trust Co. and the Merchant's Nat. Bank were held by them subject to the orders of the court in equity suit No. 2170, in which case the moneys were deposited in court and that no orders relating to said moneys can properly be made in this suit and dismissing the bill, says:

"We are of opinion that the questions attempted to be raised by the present suit should

have been presented and can be affectively determined only in equity cause No. 2170."

DISCUSSION OF CASES CITED BY PLAINTIFF IN ERROR

Plaitiff in Error cites 13 Cyc 1036 to the effect that a deposit in court if it was made on a condition with which the other party refuses to comply may be wihtdrawn by the depositor as a matter of right, and the text refers to Cummins vs. Rapley, 17 Ark. p. 381. In reference to this authority will say, that the facts of the case show that the court never took control of this money in any form nor was any order ever made by the court in reference thereto. The Rapleys deposited certain ~~money~~ money with the clerk, Cummins refused to accept it and after the case was decided the Rapleys withdrew the money. The money in this case cited by the defendants in error never came into custodia legis. If the law required the clerk to deposit the money with the county treasurer and the county treasurer in a county depository, and the money had been deposited with the clerk under an order of the court an entirely different question would have been presented.

The case of Harrington vs. LaRoque, 13 Or. pp. 344, which is cited by the plaintiff in error simply

holds that after the court has ordered the money paid it is no longer in custodia legis. We agree with the court and cite the same case as squarely for us. When the circuit court of Coos county, Oregon orders the money paid to the person to whom it belongs it will then, *and not sooner*, no longer be in custodia legis. "In order to complete a deposit the money must be delivered pursuant to an order of the court. Otherwise the delivery will have no legal effect." 13 Cyc 1036. "The fund must ordinarily come into the actual physical possession of the court else there is no effective deposit." 13 Cyc 1035.

This rule applies to the case of *Fleischner vs. Bank of McMinneville*, 36 Or. 553, 561 cited by plaintiff in error. Authorities have frequently held that property in the hands of an assignee for the benefit of creditors is not in custodia legis.

An examination of *Lang vs. Railroad*, 160 Fed. 355 and *Mount City vs. Castlemean*, 187 Fed 921, 924, in no wise limits the doctrine contended for by the defendants in error.

The facts in the case of *Moran vs. Sturges*, 154 U. S. 256 and in *Buck vs. Colbath*, 3 Wall. 334, 345, cited by plaintiff in error do not present a case of a court attempting to get control of property in the custody of another court after the litigation was ended. If the case of *Buck vs. Colbath*, attempts to enunciate a doctrine that when money is in the custody of the court that it ceases to be in such custody the moment final decree or judgment is en-

tered, it is dictum and is controverted by later decisions of the United States supreme court and all the authorities of state courts. That part of the quotation taken from *Buck vs. Colbath*, that when "the possession of the officer or Court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them" is correct. When litigation is ended there is generally an order or a judgment covering all deposits in court and of course when that is done other courts have jurisdiction. In the case at bar, there has never been any order of court attempting to direct any of the parties or any of the officers of the court as to the disposition of the fund, and the property is still in *custodia legis*.

In the case of *Dunn vs. Hunt*, 78 N. W. 1110 cited by plaintiff in error, the facts show that the plaintiff obtained an order allowing him to withdraw the money; of course after that the defendant could not claim that the money was still in *custodia legis* and the court was right in saying that the defendant never had any claim to or lien upon the money merely because it was paid into court.

The case of *Lerous vs. Baldus*, 13 S. W. 1019 cited by plaintiff in error is so self explanatory and so clearly not in point that we content ourselves with the citation as given by the plaintiff in error in its brief.

The same statement applies to the case of *Wilbur vs. Flannery*, 15 Atl. 203, 60 Vt. 581 cited by the plaintiff in error.

In reference to the case of Dunlop vs. Patterson Fire Insurance Co., 74 N. Y. 145, Trotter vs. Lehigh Zinc and Iron Co. 42 N. J. Equity, 456, Weaver, Adm'r. vs. Davis, 47 Ill. Rep. 235-7, Gilman vs. Williams, 7 Wis., 329-334, 76 Amer. Dec. 219 cited by plaintiff, we answer that these cases are not in point. If the Menasha Wooden Ware Company were suing the Southern Oregon Company and attempted to levy on this money either under a writ of attachment or under an execution after judgment these cases would apply, and then after the Circuit Court of Coos County, Oregon was through with this fund and adjudged or ordered that it be paid to the Southern Oregon Company, the fund would probably be paid to the plaintiff. This case is not an attachment proceeding. The plaintiff claims this money which is in the registry of the circuit court of Coos county, Oregon. The county clerk has no power to draw down this money and pay it to the plaintiff without an order of the circuit court of Coos county, the treasurer has no power to pay this money to the plaintiff without an order of the circuit court of Coos county, the defendant bank holds this money subject to the check of the treasurer and if it pays it to the plaintiff, it must pay it to the treasurer upon his check. The real defendants in this case are the judges of the judicial district in which Coos county is situated, and they cannot be sued. The plaintiff in error must intervene in the Coos county court and ask for a distribution of the fund to the person to whom it belongs.

MONEY HAD AND RECEIVED

The defendants in error claim that an action for money had and received will not lie under the facts pleaded in the Amended Complaint. A study of the cases cited by the plaintiff in error does not reveal a single case presenting facts similar to the facts in this case.

The law in reference to when an action for money had and received will lie is well stated in Elliott on Contracts, Volume 2, §1372 as follows:

“It is a well settled principle that if a party, through some mistake, misapprehension or forgetfulness of the facts, or some fraud, receives money to which he is not justly and legally entitled, and which he ought not in good conscience to retain, the law regards him as the receiver and holder of the money for the use of the lawful owner of it, and raises an implied promise on his part to pay over the amount to such owner, and on his failure to do so an action for money had and received may be maintained. Nor is it necessary to show privity of contract between the parties in order to entitle the plaintiff to recover. The defendant may have received the money from a third party.”

Again at section 1375, this author states:

“The action can be maintained only to recover either money or the equivalent of money. In order to maintain an action for money had and received it is necessary to establish that defendants have received money belonging to the plaintiff or to which he is in equity and good conscience entitled.”

Now applying these rules to the case at bar, we find that the circuit court of Coos County made an order that

“Upon the payment to the Clerk of this Court by the plaintiff, of the amount of money shown by the tax rolls of Coos County, Oregon, to be due from the plaintiff as taxes upon the lands assessed to the plaintiff as owners, the defendant W. W. Gage as Tax Collector for said county shall also deliver to the Clerk of this Court proper tax receipts for such taxes, and the said Clerk shall hold and retain said money and tax receipts until the final determination of the case of the United States of America vs. Southern Oregon Company now pending in the Circuit Court of the United States for the District of Oregon, Ninth Judicial Circuit, in whatever court said case may be finally determined; and upon such final determination if the real estate described in the Complaint shall be held to be the prop-

erty of the United States then said money so deposited to the Clerk shall be returned to the plaintiff, but if it be therein decided that said real estate does not belong to the United States then said money shall be paid over by the Court to the defendant herein; *unless it shall meanwhile otherwise be ordered by this Court.* It is further ordered that the defendant W. W. Gage, as Sheriff and Tax Collector of said county, do hereafter refrain from advertising any of said land or any part thereof for sale for the payment of delinquent taxes, and that he do refrain from issuing any tax delinquency certificates against any of said land until the further order of this Court or a judge thereof."

This order was made July 3rd, 1912 (Transcript of Record, p. 8) and remained in force until July 3rd, 1914 when the court made an order and decree dismissing the suit, (Transcript of Record, p. 10). The Southern Oregon Company appealed to the supreme court of Oregon which affirmed the lower court and mandate was sent down and entered on May 22nd, 1915, (Transcript of Record, p. 11.) It was not until November 30th, 1915, that the Sheriff under this litigation found himself free to issue certificates of delinquency (Transcript of Record, p. 11) and he did issue such certificates at such time and proceedings for the foreclosure of these certificates were had by the service of summons and

the filing of a complaint on March 29th, 1916. Pursuant to the order of the court the money alleged in the amended complaint was brought into court and deposited with the clerk. It then became the duty of the clerk of the court under Section 5 of Chapter 273 of the General Laws of Oregon, 1913, to deposit this money with the county treasurer and the duty of the county treasurer to place it in safe keeping with a bank in his name as county treasurer.

Now let us apply the law set forth in Elliott on Contracts aforesaid, and which is the law as enunciated by the supreme court of Oregon and the courts generally. Did the county clerk obtain this money through some mistake? Some misapprehension of the facts? Some forgetfulness of the facts? Did he obtain this money by fraud? Was he entitled to take this money when the court ordered it paid to him? When he obeyed the order of the court did he act in good conscience? When he received the money did he violate any duty when he complied with section 5 of Chapter 273 of the General Laws of Oregon, 1913, which command him to pay the money to the county treasurer?" Is the clerk under any legal obligation to pay this money to any one until the circuit court of Coos county orders it repaid?

Did the treasurer receive this money in equity and good conscience? Shall he pay it to the plaintiff on demand when the law says he shall pay it out in accordance with the order of the court? Is

he under any legal obligation to any one except the order of the Circuit Court or some court having a direct supervisory control over the circuit court, such as the supreme court of Oregon or, on writ of error from the supreme court of Oregon, the Supreme Court of the United States?

The mere statement of these questions presents the inevitable answer. An action for money had received will not lie.

MISJOINDER OF PARTIES DEFENDANT

A joint action for money had and received can be maintained only against defendants who have jointly received the money.

Coward vs. Fender, Ann. Cas, 1913, A. p. 932.

The defendants never received the money jointly. The money was paid to the clerk under the order of the court, the clerk paid it to the treasurer under the county depository law, the treasurer deposited it in one of the county depository banks under this law which now holds it subject to the county treasurer's check. Alfred Johnson, Jr., the present sheriff never received this money at all, the present county clerk only received a part of the money, Coos county, unfortunately, never received any of the money at all and is now prosecuting its tax foreclosure case to collect the taxes due on these lands.

We contend in conclusion that the plaintiff in error cannot prevail herein for the three reasons hereinbefore set out, to-wit: (1) This money is still in the custody of the circuit court of Coos county, Oregon and that court alone has power to order a distribution of the fund to the person lawfully entitled thereto; (2) None of the defendants have any money of the plaintiff which in equity and good conscience belongs to the plaintiff and which they are under a legal obligation to pay to it, the entire obligation being to the Circuit Court of Coos County, Oregon; (3) This money was never paid to the defendants jointly.

We respectfully submit that the judgment of the District Court should be affirmed.

L. A. LILJEQVIST

Attorney for Coos County, Robert R. Watson,
A. Johnson, Jr., and T. M. Dimmick.

United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

MENASHA WOODEN WARE COMPANY, a
corporation
Plaintiff in Error

|
vs.

SOUTHERN OREGON COMPANY, a corpora-
tion; COOS COUNTY; ROBERT R. WATSON,
County Clerk of Coos County; A. JOHNSON, Jr.,
Sheriff of Coos County, and T. M. DIMMICK,
Treasurer of Coos County, Oregon; and the
FIRST NATIONAL BANK OF COOS BAY,
Defendants in Error

BRIEF ON BEHALF OF DEFENDANT IN ERROR FIRST NATIONAL BANK OF COOS BAY

Upon Writ of Error
to the District Court of the United States for the
District of Oregon

Dolph, Mallory, Simon & Gearin,
Mohawk Building, Portland,
Oregon, Attorneys for Plaintiff
in Error.

W. U. Douglas, Marshfield, Oregon.
Attorney for First National Bank of Coos Bay.
L. A. Liljeqvist, Marshfield, Oregon.
Attorney for Coos County, et al.

Filed
SEP 21
F. D. Abbott

No.

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BRIEF ON BEHALF OF DEFENDANT IN
ERROR FIRST NATIONAL BANK
OF COOS BAY

Upon Writ of Error
to the District Court of the United States for the
District of Oregon

This defendant, the First National Bank of Coos Bay, is brought into this case because it is the depository of the funds in question. It cannot let go of the money without being liable upon its bond to the Treasurer of Coos County. It has no interest in the outcome of the matter, but stands ready to pay the money to whomever is legally entitled to it, yet it is placed in the same category as the proverbial, innocent by-stander, and a verdict against it in this case will subject it to an award of 6 per cent interest in plaintiff's favor.

This defendant has no desire to discuss the authority cited by plaintiff as to the form of the action. The only contention this defendant raises on that subject is that plaintiff has plead facts which show that this action will not lie because it shows that the money or property sought to be recovered is in the custody and under the control of another court, the Circuit Court of the State of Oregon for Coos County, and not under the control of these defendants.

This form of action is very simple, and the allegations to sustain it can be very meager; but the plaintiff has seen fit to state in connection with and as explanatory of it, a part of the real facts surrounding the transaction. To this complaint this defendant has interposed a demurrer, in substance as follows:

1. That the Court has no jurisdiction.

2. That there is a defect of parties defendant because the Circuit Court of the State of Oregon for Coos County, nor the Judges thereof, or any of them, are made parties.

3. That the complaint does not state facts sufficient to constitute a cause of action.

4. That it appears from the complaint that the money sought to be recovered is held by this defendant as a depository for the County Treasurer subject to the orders, control and jurisdiction of the Circuit Court of the State of Oregon for Coos County.

This demurrer in reality raises but one issue. Is the money sought to be recovered, in custodia legis? That is the issue upon which all the demurrers were decided in the lower court, and is the only question to be presented at this time.

The plaintiff refers to a claim that there were two causes of action embraced in the complaint. No such contention was made with reference to the present amended complaint, but it was claimed that the original complaint, prior to the time it was amended by interlineation to overcome that objection, did seem to refer to two causes of action.

In fact, a very full and complete discussion of the original case instituted by the Southern Oregon Company in the Circuit Court of the State of Oregon for Coos County was indulged in at the trial in the lower court, and the original complaint contained

much more of the pleadings of that case, but even after paring the original complaint, the present amended complaint sets forth enough so that the issue is not changed.

By referring to the order made by the Circuit Court of the State of Oregon for Coos County, as plead in the complaint, and shown at page 9 of the transcript, it will be seen that it authorizes the payment of the money into the custody of the Court and directs the Clerk of the Court to hold and retain said money until the final determination of the case of the United States of America vs. Southern Oregon Company, pending in the Circuit Court of the United States, for the District of Oregon. Of course there is also something said about tax receipts, but the portion of the order referring to the money is what governs the holding or disposing of it.

The plaintiff does not plead or show that the case of the United States of America vs. Southern Oregon Company has been decided, but does show that upon a trial of the demurrer interposed by one of the defendants in the case of Southern Oregon Company against Coos County, the demurrer was sustained, and an order of dismissal was made in the Circuit Court of the State of Oregon, which was affirmed by the Supreme Court of the State of Oregon. The order of dismissal does not show any order changing the former order of the Court with regard to the disposition to be made of this money. Plaintiff's brief claims that the case begun by the South-

ern Oregon Company against Coos County, et al. has been finally disposed of. However, this defendant would earnestly call the court's attention to the fact that nowhere in the plaintiff's complaint is there an allegation of that character.

Plaintiff's assignor, the Southern Oregon Company, exercised its right of appeal, and during the argument on the demurrer in the lower Court it developed, and was conceded at that time, that the said case of the Southern Oregon Company vs. Coos County was then on appeal to the United States Supreme Court. This was the condition of the record.

Plaintiff rightly contends that this form of action is an equitable action; and the maxims of equity necessarily apply, (27 Cyc p. 849) but they must be applied to all parties in the suit. It must come with clean hands and good conscience, and do equity before it can receive relief. But its assignor paid this money into Court voluntarily upon the order of the Court reciting that it should be held by the Clerk until the case of the United States vs. the Southern Oregon Company should be decided. Whether, therefore, the case of the Southern Oregon Company vs. Coos County, under which this money was paid in has been finally terminated or not, yet until that particular Court makes some different order this plaintiff is not entitled to the relief asked for from another court. It does not show any attempt on its part or on the part of its assignor to obtain an order from that Court refunding the money, but on the

contrary its complaint shows that it has arbitrarily made demand upon the custodians of the fund and thereupon brought this action. With this state of facts in view, and the liability of this defendant to the Circuit Court of the State of Oregon for Coos County, for these funds, can it be said that this plaintiff comes into court with clean hands and good conscience, when, if successful, could result in this defendant being required to pay the sum of \$93,309.17 twice?

The complaint alleges that the plaintiff's assignor, Southern Oregon Company, delivered to the County Clerk of Coos County, Oregon, a check for \$75,000.00, to comply with the order of the State court heretofore referred to, and also that later the said Southern Oregon Company delivered to the Clerk of the Court of Coos County, Oregon, a check for \$18,309.17 for the purpose of complying with said order of the court.

The County Clerk and the Clerk of the Circuit Court of the State of Oregon, for Coos County, is the same identical official and person (See Constitution of Oregon, Art. II, par. 15.)

It was the duty of the custodian of these funds, upon receipt of the checks, to cash them. They were delivered for the purpose of paying so much money into Court, and when the Clerk accepted them, that implied an undertaking on his part to use diligence in presenting them for payment.

“Where the treasurer received the certificate of deposit under the terms of the judgment of the Court, he could only receive the same as money, and it was his plain duty to have reduced the money, certified to be payable upon presentation of certificate, to his possession, and to have safely kept the the same until disbursed under authority of law.”

Agoure vs. Peck et al., (Colo.) 121 Pac. 706.

The first check was delivered to the Clerk prior to 1913, at which time the legislature of the State of Oregon passed an act which required that County Clerks of the different counties holding in their possession or custody public funds, or money in trust for any persons, by virtue of their office, or any money held in custodia legis, should pay the same over to the County Treasurer, and also providing that the County Treasurer shall keep the money on deposit with certain banks therein described as County depositories.

Oregon Laws 1913, page 515.

The complaint shows that the County Clerk did endorse and assign the checks to the County Treasurer, and that he did assign the same to the First National Bank of Coos Bay, and that they were

paid; and it also alleges, upon information and belief, that the First National Bank has credited said sums to the said defendant T. M. Dimmick as County Treasurer. The possession of the Clerk, the Treasurer, and the Bank then was the possession of the Court, in compliance with the statute of the Oregon Laws of 1913 at page 515.

Defendant claims that the complaint shows when this money was paid into Court it became custodia legis, and is so at the present time.

true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues."

Covell vs. Heyman 111 U. S. R. 182-183.

"When the Clerk receives a fund in his official capacity, his possession is that of the Court, and the Court has an inherent right to control such funds."

"Usually the Clerk has no power, without an order of the Court to make any transfer or alteration in the disposition of such fund or pay it out of Court."

7 CYC p. 225.

Bowden vs. Schotzell, S. Carolina. 23 A. M. Dec. 170.

Martin vs. Shannonhouse, 203 Fed. 517.

Shelton vs. Walthousen, 80 Conn. 599.
69 A. 1030.

Green vs. Ward, 1 Barb, 21.

Fidelity vs. Rankin, 124 Pacific Rep. 71.

“The Court in which the fund is deposited has exclusive jurisdiction of the question of the right to the money, and all claims against the deposit must be asserted there.”

Gregory vs. Merchants National Bank et al,
Mass. 50 N. E. 520.

Gregory vs. Boston Safety Deposit Trust Co.
144 U. S. 655.

Mariner vs. Ingraham, 255 Ill. 108. 99 N. E.
351.

CYC 13 Vol. p. 1038.

Wayman vs. Southard, 10 Wheaton U. S. I,
Clarke vs. Shaw, 28 Fed. 356.

In re Forysth, 78 Fed. 296.

Corbitt vs. Farmers Bank of Del., 114 Fed.
602.

D. B. Martin Co., vs. Shannonhouse, 203 Fed.
517.

So that the deposit into Court shall be completed the money must be delivered pursuant to an order of the court, otherwise the delivery will have no legal effect.

13 CYC 1036.

Brown vs. People, 3 Colo. 115.

Harris vs. Inst. 137 N. Y. Sup. 234.

In this case the order was made directing the Clerk to receive the money and hold it for a period

of time to be fixed by the determination of the other litigation.

“The money was paid into Court under order of the Court, and was held by the Court *custodia legis*. Whether the order under which it was paid was properly made, cannot be determined upon a proceeding in another Court. The Court by virtue of the pending suit in equity had jurisdiction of the subject matter and the parties. No other Court has jurisdiction of any question pertaining to the disposition of the money which is held by that Court. Claims upon the money are to be made in that Court and to be heard and determined there— * * * Any other doctrine would be at variance with the right of control of its own business, which inheres to a Court of Justice, and would cause uncertainty and confusion in the determination of legal rights.”

Gregory vs. Merchants National Bank et al,
Mass. 50 N. E. 520.

Citing

Tuck vs. Manning, 150 Mass. 211, 22 N. E.
1001.

Book Co., vs. De Golier 115 Mass. 67.

Tifft Weller vs. Sternberger, 5 L. R. A. 221,
40 Fed. 3-4.

Senior vs. Pierce, 31 Fed. 625-629.

Covell vs. Hayman, III U.S. 176.

No other court has any power or jurisdiction to disturb these funds so long as the Circuit Court of the State of Oregon for Coos County exercises any jurisdiction over it. That it still continues to exercise jurisdiction is established by the fact that it has never revoked, changed or amended the original order under which it was received.

“The power and duty of a Court to decide for itself whether property in its possession or under its control, cannot be taken from it by process issuing from another Court, is essential to its rights and duty to administer to its suitors such remedy as, according to law, they may be entitled, and to enforce its judgments.”

D. B. Martin Co. vs. Shanonhouse, 203 Fed. 517.

“The Courts generally hold that to permit funds in their possession, to be subject to attachment, would be contrary to public policy.”

D. B. Martin Co. vs. Shanonhousen, 203 Fed. 517.

Citing Clarke vs. Shaw, 28 Fed. 356, and In re Forsyth, 78 Fed. 296.

“A fund custodia legis and under the control and subject to the order and decrees of Chancery Courts, cannot be paid out by the Clerk and

Master, to any one, except in obedience to the order of that Court, and a party cannot resort to a different forum and recover of the Clerk and Master of the Chancery Court and his sureties, the money and thus oust the Chancery Court of its jurisdiction.”

Craig et al vs. The Governor for the use of White, 43 Tenn. 244.

Assuming doubt for argumentative purposes only, as to whether or no this court has a right to interfere with funds in the possession of the State Court and over which it assumes jurisdiction, the pleadings in this case establish the fact that these funds are not in the control of these defendants, but under the control and in the possession of the State Court. How then can the plaintiff maintain this action, without making the State Court or its Judges parties?

“The money claimed in this case was deposited by the Circuit Court of the United States, and is to be held by the defendant bank subject to withdrawal only upon the order of one of the judges of that Court. It is quite clear that no proper inquiry could be had in regard to the ownership of the fund without making the judges of the Court parties. But the objec-

tion lies deeper than this. The money was paid into Court under the order of the Court and was held by the Court custodia legis."

Gregory vs. Merchants National Bank et al.
Mass. 50 N. E. 520.

There are so many various classes of process, proceedings or means under and by which property and money become custodia legis, that naturally the decisions are not all controlled by any one rule but only the facts and statutes governing each individual case, as to when the property ceases to become custodia legis. For instance, numerous decisions can be found to the effect that where a Sheriff has on execution or attachment, satisfied the execution out of the attached property the surplus is then amenable to the process of other courts. The reason for this is clearly that the court only took possession and control of sufficient property or funds to satisfy its mandates, and when the amount is realized it has no jurisdiction or control of the balance. Again, attached property ceases to become custodia legis when the original action is dismissed because, as a matter of statute, the attachment is dissolved and by its dismissal the officer of the Court has no further power or authority to retain the property in his possession.

There are many decisions on the question of custodia legis, but one thing is certain that so long as

the property is in the actual or constructive custody of a Court, and it appears to be exercising any jurisdiction whatever therein, that possession will not be disturbed by any other Court.

The diversity of opinions upon the question of when the custody of the court ceases are explained solely by the fact of the different circumstances and statutes governing each particular case. Of the numerous cases cited by the plaintiff to support its contention that the State Court has lost control of this \$93,309.17, there does not seem to be any case which applies.

The citation of *Moran vs. Sturges*, 154 U.S. 256, giving a quotation from *Buck vs. Colbath*, 3 Wallace 334, comes nearer to matching the shade of reasoning which plaintiff seeks to apply than any other citation given by it, but even assuming that the language in the quotation is not dicta and was used as a part of the reasoning adopted by the Court in arriving at its decision in that case, the effect which plaintiff's theory demands for it cannot be conceded. The pertinent part of the quotation is as follows:

“It is only while the property is in possession of the Court, either actually or constructively, that the court is bound or proposes to protect the possession from the process of other courts. Whenever the litigation is ended or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to

the rights of the parties before them, whether those rights require them to take possession of the property or not."

But in this instance the Circuit Court of the State of Oregon, for Coos County, still actually has possession of this money. The order recites that this money shall be held by the Clerk until another case entirely separate from the one under which it was deposited in Court, shall be decided. Whether the Court had a right to make such order is not for plaintiff to question, because pursuant to that order plaintiff's assignor voluntarily placed this money in the court's custody.

As to whether the funds cease to be in custodia legis whenever the litigation is ended, that quotation must be accepted with some qualification. In many instances it may be true, but can it be said to be a general rule?

"The Court in which a fund has been deposited has power to order distribution of it, and when jurisdiction is once obtained it is not lost, either by the abatement of the suit or dismissal of the bill. After the fund is distributed that Court has no further jurisdiction over it in the absence of fraud. The court in which the fund is deposited has exclusive jurisdiction of the question of the right to the money, and all

claims against the deposit must be asserted there.”

13 CYC 1038.

Davis vs. Watkins, 3 Bush Ky. 224.

Reinhold vs. Hansson, 169 Ill. Ap. 334.

Priestly vs. Hillard & Taber, 187 Fed. 784.

Gregory vs. Merchants' Nat. Bank, 171 Mass.
67.

Gregory vs. Boston Safety Deposit, 144 U.S.
67. 50 N. E. 520.

The defendant claims the fund to be *custodia legis*, and while “*custodia legis*” is a general term and covers many different means of the acquisition and holding of property by the Court or court officer, yet in this particular instance the money involved was directed to be paid in Court to the Clerk and held by him for a definite time which has not yet expired, and it was so paid.

This fund therefore is a **DEPOSIT IN COURT** and is governed by the rules concerning property acquired and held in the custody of the court in that particular manner.

The last quotation above given, 13th Cyc 1038, and the citations supporting the same, establish that when jurisdiction is once so obtained of a fund, it is not lost either by abatement of the suit or dismissal of the bill, but the court in which the fund is de-

posited has exclusive jurisdiction of the question of the right to the money, and all claims against the deposit must be asserted there.

That rule is decisive in this case because the statement of facts by the complaint shows that the money was deposited in the State Court upon an order of that court, and in addition shows the contents of the order itself. While it is true the complaint shows the order required the Sheriff or the defendant in that case to do certain things which were not done, in it were no qualifications, the money was not to be returned upon the doing or not doing of anything by the Sheriff or the other defendants in the case, but was to be held by the Court until the litigation between the United States of America and the Southern Oregon Company in the Federal Court was terminated.

Granting the possibility of some variation in the rule above cited as to deposits in court, yet there has been no modification of that order, nor is the litigation between the United States of America and the Southern Oregon Company alleged to have been terminated. How could it be possible for the State Court to lose jurisdiction over these funds without some modification of the order or the happening of that event?

That the State Court is continuing to exercise jurisdiction over the funds on deposit with it is apparent from the order itself. If the contingency had happened, or any modification of the order had been

made, such apparent exercise of jurisdiction as shown by the order would be nullified, but such is not the case, nor does the complaint allege it.

While the amount involved in this case is large, the principle underlying the whole question seems simple. Shall this Court be bound by the rule repeatedly adhered to in the decisions of the many State and Federal Courts, under and by which they have refused to interfere with the property under the control and jurisdiction of another court?

Respectfully submitted,

W. U. DOUGLAS,

Attorney for Defendant in error
First National Bank of Coos Bay.

United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

MENASHA WOODEN WARE COMPANY, a corporation
PLAINTIFF IN ERROR

vs.

**SOUTHERN OREGON COMPANY, a corporation; COOS
COUNTY; ROBERT R. WATSON, County Clerk of Coos
County; A. JOHNSON, Jr., Sheriff of Coos County, and
T. M. DIMMICK, Treasurer of Coos County, Oregon; and
FLANAGAN & BENNETT BANK, a Corporation**
DEFENDANTS IN ERROR

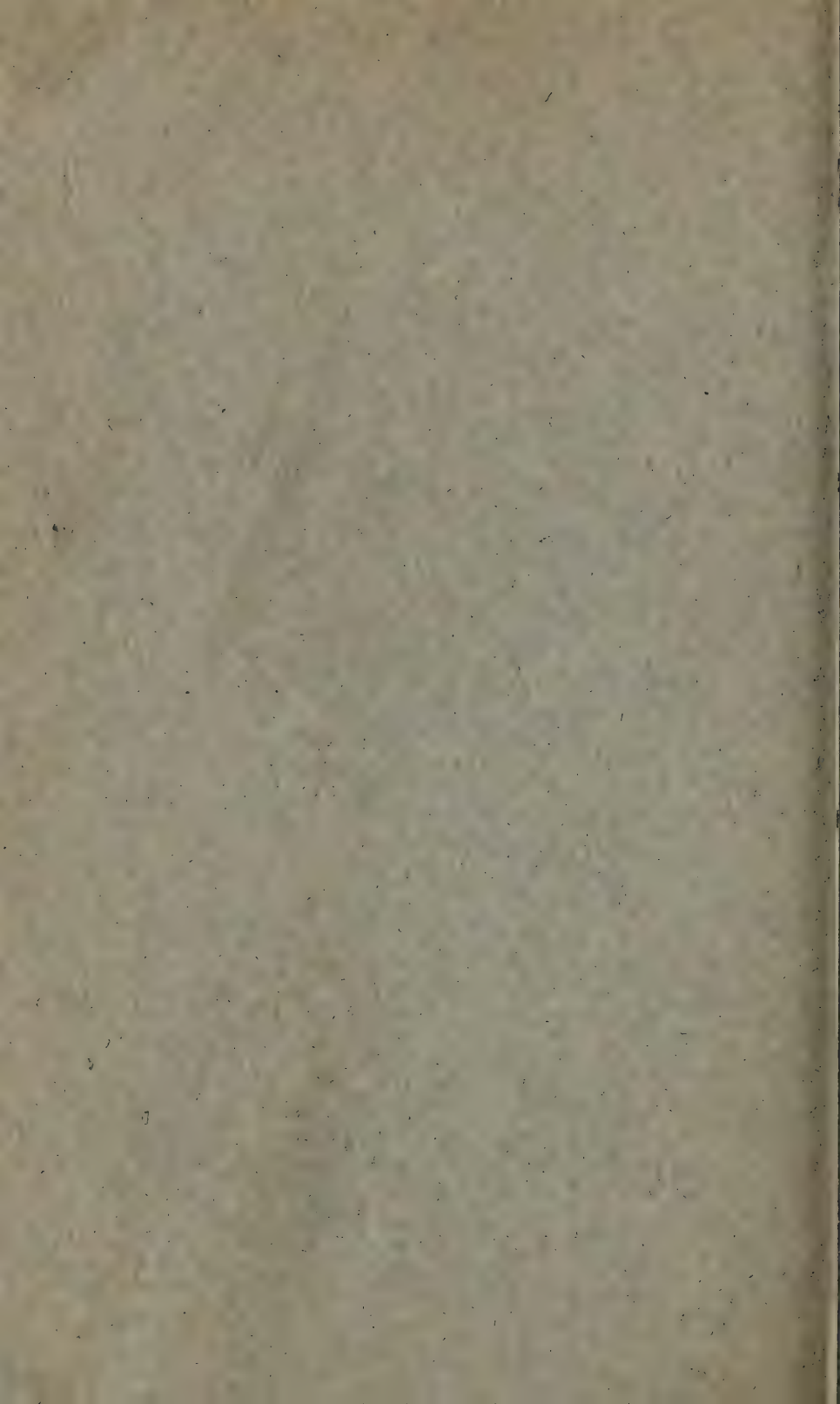
TRANSCRIPT OF RECORD

**Upon Writ of Error to the District Court of the United
States, for the District of Oregon**

Filed

AUG 28 1916

F. D. Monckton,
Clerk.



United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MENASHA WOODEN WARE COMPANY, a corporation
PLAINTIFF IN ERROR

vs.

**SOUTHERN OREGON COMPANY, a corporation; COOS
COUNTY; ROBERT R. WATSON, County Clerk of Coos
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States, for the District of Oregon**

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Menasha Wooden Ware Co.

No.

*United States Circuit Court of Appeals
for the Ninth Circuit.*

MENASHA WOODEN WARE COMPANY, a corporation,
Plaintiff in Error,

vs.

SOUTHERN OREGON COMPANY, a corporation; COOS
COUNTY; ROBERT R. WATSON, County Clerk of
Coos County; A. JOHNSON, JR., Sheriff of Coos
County; and T. M. DIMMICK, Treasurer of Coos
County, Oregon, and the FLANAGAN & BENNETT
BANK, a corporation,

Defendants in Error.

NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD:

Dolph, Mallory, Simon & Gearin,
Mohawk Building, Portland, Oregon,
for the Plaintiff in Error.

Lawrence A. Liljeqvist, Marshfield, Oregon,
for Coos County; Robert R. Watson, County Clerk
of Coos County; A. Johnson, Jr., Sheriff of Coos
County; and T. M. Dimmick, Treasurer of Coos
County, Oregon, Defendants in Error.

Teal, Minor & Winfree, Spalding Building,
Portland, Oregon,
for the Flanagan & Bennett Bank, a corporation,
Defendant in Error.

CITATION ON WRIT OF ERROR.

United States of America, District of Oregon, ss.

TO SOUTHERN OREGON COMPANY, A CORPORATION;
COOS COUNTY; ROBERT R. WATSON, COUNTY
CLERK OF COOS COUNTY; A. JOHNSON, JR.,
SHERIFF OF COOS COUNTY; T. M. DIMMICK, TREAS-
URER OF COOS COUNTY, OREGON, AND THE FLANA-
GAN & BENNETT BANK, A CORPORATION, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Menasha Wooden Ware Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said district, this fifth day of July, in the year of our Lord. one thousand, nine hundred and sixteen.

R. S. BEAN,
Judge.

Due service of the foregoing Citation on Writ of Error admitted this 12th day of July, A. D. 1916.

L. A. LILJEQVIST,
District Attorney.

By R. O. GRAVES,
Deputy.

Attorneys for Coos County, Robert R. Watson,
County Clerk, A. Johnson, Jr., Sheriff, and T. M.
Dimmick, County Treasurer of Coos County,
Oregon.

WIRT MINOR,

Attorney for Flanagan & Bennett Bank.

Filed July 14, 1916.

G. H. MARSH,

Clerk.

*In the United States Circuit Court of Appeals
for the Ninth Circuit.*

WRIT OF ERROR.

MENASHA WOODEN WARE COMPANY, a cor-
poration,

Plaintiff in Error,

vs.

SOUTHERN OREGON COMPANY, a corporation;
COOS COUNTY; ROBERT R. WATSON, Coun-
ty Clerk of Coos County; A. JOHNSON, Jr.,
Sheriff of Coos County; T. M. DIMMICK, Treas-
urer of Coos County, Oregon, and the FLANA-
GAN & BENNETT BANK, a corporation,

Defendants in Error.

The United States of America, ss.

THE PRESIDENT OF THE UNITED STATES
OF AMERICA.

TO THE JUDGE OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF OREGON,
GREETING:

Because in the records and proceedings, as also

in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between Menasha Wooden Ware Company, a corporation, plaintiff and plaintiff in error, and Southern Oregon Company, a corporation; Coos County, Robert R. Watson, County Clerk of Coos County; A. Johnson, Jr., Sheriff of Coos County; T. M. Dimmick, Treasurer of Coos County, Oregon, and the Flanagan & Bennett Bank, a corporation, defendants and defendants in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the HONORABLE EDWARD DOUGLAS
WHITE, Chief Justice of the Supreme Court
of the United States, this 5th day of July, 1916.

[SEAL]

G. H. MARSH,

Clerk of the District Court of the United
States for the District of Oregon.

By F. L. BUCK,

Deputy.

Service of the above Writ of Error made this
5th day of July, 1916, upon the District Court of
the United States for the District of Oregon, by
filing with me as Clerk of said Court, a duly certi-
fied copy of said Writ of Error.

G. H. MARSH,

Clerk of the District Court of the United
States for the District of Oregon.

By F. L. BUCK,

Deputy.

Filed July 5, 1916.

G. H. MARSH,

Clerk, United States District Court,
District of Oregon.

*In the District Court of the United States for the
District of Oregon.*

November Term, 1915.

Be it remembered, That on the 27th day of Jan-
uary, 1916, there was duly filed in the District
Court of the United States for the District of
Oregon, a complaint, and thereafter there was
duly filed in said Court demurrers to the said

Complaint, and thereafter, after a hearing duly had, the Court on March 20, 1916, sustained the said demurrers, and thereafter, on April 17, 1916, there was duly filed in said Court an Amended Complaint, in words and figures as follows, to wit:

AMENDED COMPLAINT.

*In the District Court of the United States for the
District of Oregon.*

MENASHA WOODEN WARE COMPANY, a corporation,

Plaintiff,

vs.

SOUTHERN OREGON COMPANY, a corporation;
COOS COUNTY; ROBERT R. WATSON, County Clerk of Coos County; A. JOHNSON, Jr., Sheriff of Coos County, and T. M. DIMMICK, Treasurer of Coos County, Oregon, and the FLANAGAN & BENNETT BANK, a corporation,

Defendants.

Plaintiff complaining of defendants, by this its Amended and Supplemental Complaint by leave of Court filed, for cause of action alleges:

I.

That the plaintiff is and during all the times herein mentioned has been, a corporation duly organized and existing under the laws of the State of Wisconsin, and is a citizen and resident of the State of Wisconsin, and qualified to do business in the State of Oregon.

II.

That the defendant Southern Oregon Company is and during all the times herein mentioned has been, a corporation, organized and existing under and by virtue of the laws of the State of Oregon, and is a citizen and resident of the said State.

III.

That the defendant Coos County is a political division of the State of Oregon, is a body politic and corporate, and one of the counties of the State of Oregon; that the defendant Robert R. Watson is the County Clerk and defendant T. M. Dimmick is the County Treasurer of said Coos County, Oregon. That during the year 1912 one W. W. Gage was, and the defendant A. Johnson, Jr., now is, the Sheriff and Tax Collector of said Coos County, Oregon, and all of said defendants are and during all the times herein mentioned have been citizens and residents of the State of Oregon.

IV.

That the defendant Flanagan & Bennett Bank is a banking corporation, duly organized and existing under and by virtue of the laws of the State of Oregon, and is a citizen and resident of the State of Oregon.

V.

That the amount involved in this suit, exclusive of costs, exceeds the sum of \$3000.00.

VI.

That on the 2nd day of July, 1912, the defendant Southern Oregon Company claiming to own cer-

tain lands in Coos County, Oregon, filed its certain Bill of Complaint in the Circuit Court of the State of Oregon for Coos County, against W. W. Gage as Sheriff and Tax Collector of the said Coos County, Oregon, in and by which Bill of Complaint the said Southern Oregon Company alleged that the said W. W. Gage as Sheriff and Tax Collector of Coos County was about to advertize and sell said lands for delinquent taxes.

And in and by said Bill of Complaint it was further alleged that on the 3rd day of March, 1869, the Congress of the United States passed an Act granting to the State of Oregon said lands to aid in the construction of a wagon road from the navigable waters of Coos Bay to Roseburg in the State of Oregon. That on October 22nd, 1870, the Legislative Assembly of the State of Oregon transferred said grant and the lands included therein to the Coos Bay Wagon Road Company. That the Southern Oregon Company was the successor in interest of the Coos Bay Wagon Road Company and succeeded to the title of said company in said lands.

And it was further alleged in said Complaint that the said Southern Oregon Company was in possession of and claimed to own all said lands in Coos County, which lands were particularly described in said Bill of Complaint and that the title to all said lands appeared of record to be in said Southern Oregon Company.

And it was further alleged in said Complaint that the United States of America had brought

suit, which suit was then pending, against the said Southern Oregon Company, to forfeit the title to all said lands and revest the same in the Government. And it was further alleged in said Complaint that all of said lands appeared on the tax rolls of Coos County, Oregon, for the years 1909, 1910, 1911 and 1912 assessed to said Southern Oregon Company and the taxes for said years had not been paid and were delinquent, and that because of said suit the said Southern Oregon Company could not safely pay said taxes.

And it was further alleged in said Bill that by virtue of the provisions of Sections 3693 and 3694, Lord's Oregon Laws, the said W. W. Gage, as Sheriff and Tax Collector of Coos County, Oregon, was about to advertise all said lands for sale for delinquent taxes and was about to issue tax delinquency certificates against all said property which certificates might be foreclosed as provided by Section 3695, Lord's Oregon Laws, and such title as said Southern Oregon Company had in said property would be sold; and said Southern Oregon Company had no plain, speedy or adequate remedy at law in the premises.

VII.

That due service of Summons and Complaint was had in said suit upon the defendant and appearance was duly entered by said defendant.

That on the 3rd day of July, 1912, the said Circuit Court of the State of Oregon for Coos County, then having jurisdiction over the parties and the

subject matter of said suit and all parties in said suit being before the Court, duly made and entered an Order restraining the defendant W. W. Gage as prayed for in said suit, which Order was and is in words as follows, to wit:

“This matter now coming on to be heard, the Court having read the Complaint herein and being fully advised in the premises and the Court being satisfied that this is a proper case for the issuance of a temporary order of injunction,

It is hereby ordered that upon the payment to the Clerk of this Court by the plaintiff, the amount of money shown by the tax rolls of Coos County, Oregon, to be due from the plaintiff as taxes upon the lands assessed to the plaintiff as owners, the defendant W. W. Gage as Tax Collector for said county shall also deliver to the Clerk of this Court proper tax receipts for such taxes, and the said Clerk shall hold and retain said money and tax receipts until the final determination of the case of the United States of America v. Southern Oregon Company now pending in the Circuit Court of the United States for the District of Oregon, Ninth Judicial Circuit, in whatever court said case may be finally determined; and upon such final determination if the real estate described in the Complaint shall be held to be the property of the United States then said money so deposited to the Clerk shall be returned to the

plaintiff, but if it be therein decided that said real estate does not belong to the United States then said money shall be paid over by the Court to the defendant herein; unless it shall meanwhile otherwise be ordered by this Court.

It is further ordered that the defendant W. W. Gage, as Sheriff and Tax Collector of said county, do hereafter refrain from advertising any of said land or any part thereof for sale for the payment of delinquent taxes, and that he do refrain from issuing any tax delinquency certificates against any of said land until the further order of this Court or a Judge thereof."

VIII.

That the defendant W. W. Gage filed a demurrer to said Bill of Complaint, and on the 3rd day of July, 1914, the Court sustained said demurrer and made and entered the following Order, to wit:

"Comes now to be heard the demurrer of the defendant to the complaint and demurrer of defendant to the supplemental complaint and the plaintiff appearing by A. S. Hammond, one of its attorneys, and the defendant appearing by L. A. Liljeqvist, District Attorney, his attorney, and the Court having considered said demurrer and each of them, and being advised in the premises,

It is considered, ordered and adjudged that said demurrers and each of them be sustained.

And the plaintiff stating in open Court that

it would stand upon its Complaint and Supplemental Complaint and did not desire to amend or plead further,

It is considered, ordered, adjudged and decreed that plaintiff's suit be and the same is hereby dismissed and all restraining orders heretofore entered be and the same are hereby vacated and the temporary injunction issued herein is hereby set aside and said orders revoked, and it is further decreed that defendant have and recover his costs and disbursements issued herein and that execution issue therefor."

IX.

That the Southern Oregon Company duly appealed from the said judgment of the Circuit Court of the State of Oregon for Coos County, to the Supreme Court of the State of Oregon, and said Supreme Court on the 13th day of April, 1915, affirmed said judgment of the Circuit Court of the State of Oregon for said Coos County, and directed its mandate to be sent to the Circuit Court of the State of Oregon for Coos County. That thereupon the mandate of the Supreme Court of the State of Oregon in said case was sent to the Circuit Court of the State of Oregon for Coos County and was duly entered of record in said Court on the 22nd day of May, A. D. 1915.

X.

This plaintiff further alleges that on the 30th day of November, 1915, the defendant A. Johnson, Jr., as Sheriff and Tax Collector of Coos County,

Oregon, issued to Coos County Certificates of Delinquency for the delinquent taxes for 1909 on all said property except six small pieces upon which certificates were issued to private parties in accordance with the provisions of Section 3698, Lord's Oregon Laws, and the said defendant Coos County on the 29th day of March, 1916, filed its Complaint in the Circuit Court of the State of Oregon for Coos County against the defendant Southern Oregon Company to foreclose all said Certificates of Delinquency and to sell all said lands to satisfy the same, which suit is now pending.

XI.

And this plaintiff further alleges that on March 15th, 1913, the said defendant Southern Oregon Company in compliance with the terms of said Order of Court drew its check payable to the order of James Watson, who was then County Clerk, for the sum of \$24,752.62, which check was duly certified by said Flanagan & Bennett Bank and delivered to the said James Watson, then County Clerk. That said James Watson, who was then County Clerk, on July 5th, 1913, without having any authority so to do, endorsed said check for payment to T. M. Dimmick, County Treasurer; that thereupon on said July 5th, 1913, said T. M. Dimmick, County Treasurer, presented said check for payment to the defendant Flanagan & Bennett Bank and the same was duly paid.

That this plaintiff is informed, however, and believes that the defendant Flanagan & Bennett Bank has, but without any authority from this

plaintiff or said Southern Oregon Company, or at all, so to do, credited said sum of \$24,752.62 on its books to the defendant T. M. Dimmick on his account with said bank as County Treasurer, and defendant T. M. Dimmick claims to have some interest in said sum of \$24,752.62.

And this plaintiff alleges that said sum of \$24,752.62 and the whole thereof, has remained intact in the possession of said Flanagan & Bennett Bank since March 15th, 1913, and that said Flanagan & Bennett Bank received the same as above set out to the use and benefit of the Southern Oregon Company, defendant, and this plaintiff as Assignee of said Southern Oregon Company, as hereinbefore set out, and that said claim of defendant T. M. Dimmick to have any interest in said money is entirely unfounded.

XII.

And this plaintiff further alleges that on the 31st day of March, 1914, this plaintiff advanced and furnished to the defendant Southern Oregon Company to be used by said Southern Oregon Company in complying with the terms of said Order of Court and for no other purpose, the sum of \$35,000.00, which money was deposited by this plaintiff to the credit of the said Southern Oregon Company in the Flanagan & Bennett Bank, defendant above named.

That on said 31st day of March, 1914, said defendant Southern Oregon Company had to its credit in said Flanagan & Bennett Bank the sum

of \$3,863.26 in addition to said sum of \$35,000.00 so deposited as above set out.

That on said 31st day of March, 1914, the defendant Southern Oregon Company in order to comply on its part with the terms of said Order of Court, drew its check on defendant Flanagan & Bennett Bank in favor of James Watson, who was then County Clerk, for said sum of \$38,863.26; that said James Watson, who was then County Clerk, without having any authority so to do, endorsed and delivered said check to T. M. Dimmick, County Treasurer, and said T. M. Dimmick, County Treasurer, endorsed said check to the defendant Flanagan & Bennett Bank, who paid the same.

That plaintiff is informed, however, and believes that the defendant Flanagan & Bennett Bank has, without any authority from this plaintiff or said Southern Oregon Company, or at all, so to do, credited said sum of \$38,863.26 on its books to the defendant T. M. Dimmick on his account with said bank as County Treasurer, and said T. M. Dimmick claims to have some interest in said sum of \$38,863.26.

And this plaintiff alleges that said sum of \$38,863.26 and the whole thereof has remained intact in the possession of said Flanagan & Bennett Bank since March 31st, 1914, and that said Flanagan & Bennett Bank received the same as above set out to the use and benefit of the Southern Oregon Company, defendant, and this plaintiff, as Assignee of

said Southern Oregon Company as hereinabove set out as to said \$3,863.26 and directly for the use and benefit of this plaintiff as to said \$35,000.00 above set out, and that said claim of the defendant T. M. Dimmick to have any interest in said money is entirely unfounded.

XIII.

And this plaintiff further alleges that neither the said W. W. Gage, as Tax Collector of said Coos County, Oregon, nor said A. Johnson, Jr., as Tax Collector of said Coos County, Oregon, ever delivered to the Clerk of said Coos County, Oregon, proper, or any, tax receipt or receipts, for such or any taxes referred to in the Complaint in said suit of the Southern Oregon Company vs. W. W. Gage, as above set out.

XIV.

And this plaintiff further alleges that long prior to the 10th day of November, 1915, the defendant Southern Oregon Company duly assigned to this plaintiff whatever interest it might be said to have in said sums of money, or any of them, and duly authorized this plaintiff to apply to said defendant Flanagan & Bennett Bank, or to any person having possession of said moneys, or any of them, and to demand the return of the same and repayment thereof to this plaintiff. And this plaintiff says that on or about the 10th day of November, 1915, this plaintiff duly notified said Flanagan & Bennett Bank and said Robert R. Watson, County Clerk,

and said T. M. Dimmick, County Treasurer, of said assignment and authorization, and both this plaintiff and the defendant Southern Oregon Company duly notified said Flanagan & Bennett Bank and said Robert R. Watson and said T. M. Dimmick of all the facts herein pleaded. That on or about the 10th day of November, 1915, after having given said notice to said Flanagan & Bennett Bank and said Robert R. Watson and said T. M. Dimmick of all the facts herein pleaded, this plaintiff and the defendant Southern Oregon Company demanded of said Flanagan & Bennett Bank and said Robert R. Watson and said T. M. Dimmick the return to this plaintiff of all said moneys. And plaintiff alleges that said Flanagan & Bennett Bank and said Robert R. Watson and said T. M. Dimmick refused and still refuse to deliver to this plaintiff said sum of \$38,863.26, or said sum of \$24,752.62, or any part of either of said sums, and that the whole thereof remains due and payable to this plaintiff from said Flanagan & Bennett Bank.

Wherefore, plaintiff prays judgment against said Flanagan & Bennett Bank, Robert R. Watson and T. M. Dimmick for said sum of \$24,752.62 and said sum of \$38,863.26, in all the sum of \$63,615.88. and interest thereon at the rate of six per cent per annum from the 10th day of November, 1915, and for the costs and disbursements of this action.

DOLPH, MALLORY, SIMON & GEARIN,

Attorneys for Plaintiff.

STATE OF OREGON, }
County of Coos. } ss.

I, Herbert Armstrong, being first duly sworn, depose and say that I am the agent of the plaintiff in the above entitled suit; and that the foregoing amended and supplemental complaint is true as I verily believe.

HERBERT ARMSTRONG.

Subscribed and sworn to before me this 15th day of April, A. D. 1916.

[SEAL]

JNO. H. GREVES,

Notary Public for the State of Oregon.

And afterwards, to wit, on the 19th day of April, 1916, there was duly filed in said Court and cause, a Demurrer of the defendant Flanagan & Bennett Bank to the Amended Complaint, in words and figures as follows, to wit:

DEMURRER OF FLANAGAN & BENNETT
BANK.

Comes now the defendant Flanagan & Bennett Bank, a corporation, and appearing herein for itself only and for not its co-defendants, demurs to the amended and supplemental complaint and to the whole thereof upon the ground and for the reasons following, that is to say:

I.

It appears from the face of said complaint that this Court has no jurisdiction of the subject-matter of this action.

II.

It appears from the face of said complaint that the subject-matter of this action is now involved in a certain suit pending in the Circuit Court of the State of Oregon for Coos County, wherein Southern Oregon Company, alleged by the complaint to be the assignor of the plaintiff, is plaintiff and one W. W. Gage, Sheriff and Tax Collector of Coos County, Oregon, and predecessor in office of the defendant A. Johnson, Jr., is defendant.

III.

It appears from the face of said complaint that there is a defect of parties defendant in this, that it appears from the face of the complaint that the sums of money sought to be recovered are not held by or claimed by the defendant Robert R. Watson or by the Southern Oregon Company or by A. Johnson, Jr., or by the County Clerk of Coos County, or by the Sheriff of Coos County, Oregon, but are claimed by and the legal title thereto is vested in the defendant T. M. Dimmick as Treasurer of Coos County, Oregon, and that this defendant has no interest in the same and did not at any time take or receive the same from the plaintiff or his assignor or for the use of the plaintiff or his assignor.

IV.

It appears from the face of said complaint that the complaint does not state facts sufficient to constitute a cause of action and that if the plaintiff has any remedy such remedy is in equity and not at law.

V.

It appears from the face of said complaint that the sums of money, the subject-matter of this action, were deposited in the Circuit Court of the State of Oregon for Coos County to be retained in said Court until the final determination of the case of United States of America against the Southern Oregon Company, formerly pending and heretofore determined by this Court and now pending on appeal in the Circuit Court of Appeals of the United States for the Ninth Judicial Circuit, and that no final determination of said case has been had or made.

TEAL, MINOR & WINFREE,

Attorneys for Defendant,

Flanagan & Bennett Bank.

I do hereby certify that I am an attorney of this Court; that I have read the foregoing demurrer and that in my opinion the same is well founded in law and that the same is not filed for delay.

WIRT MINOR.

Filed April 19, 1916.

G. H. MARSH,

Clerk.

And afterwards, to wit, on the 24th day of April, 1916, there was duly filed in said Court and cause, a Motion of Coos County and others to strike out the Amended Complaint, in words and figures as follows, to wit:

MOTION OF COOS COUNTY TO STRIKE OUT.

Now comes Coos County, Robert R. Watson,

County Clerk of Coos County, A. Johnson, Jr., Sheriff of Coos County, and T. M. Dimmick, Treasurer of Coos County, appearing for themselves alone and not for their co-defendants jointly and severally, move to strike from plaintiff's Amended and Supplemental Complaint all of subdivision numbered ten therein for the reason that the same is sham, frivolous, and irrelevant.

These defendants further jointly and severally move the Court for an order striking from the files in the above entitled action the Amended and Supplemental Complaint of the plaintiff herein for the reason that the same is sham, frivolous, and irrelevant in that it is substantially a repetition of plaintiff's original complaint filed herein, which said complaint was demurred to by these defendants for the reason that the Court had no jurisdiction of the subject matter of the action, among other causes, and this Court heretofore sustained this defendant's said demurrer on the ground that the Court had no jurisdiction of the subject matter of said action.

LAWRENCE A. LILJEQVIST,

Attorney for Defendants above named.

Filed April 24, 1916.

G. H. MARSH,

Clerk.

And afterwards, to wit, on the 24th day of April, 1916, there was duly filed in said Court and cause, a Demurrer of Coos County and others

to the Amended Complaint, in words and figures as follows, to wit:

DEMURRER OF COOS COUNTY AND OTHERS.

Comes now the defendants Coos County, Robert R. Watson, County Clerk of Coos County, A. Johnson, Jr., Sheriff of Coos County, Oregon, and T. M. Dimmick, Treasurer of Coos County, Oregon, and appearing for themselves and not for their co-defendants, jointly and severally demur to the Amended and Supplemental Complaint, and to the whole thereof upon the ground and for the reasons following, that is to say:

I.

It appears from the face of the Amended and Supplemental Complaint that this Court has no jurisdiction of the subject matter of this action.

II.

It appears from the face of the Amended and Supplemental Complaint that the subject matter of this action is now involved in a certain suit pending in the Circuit Court of the State of Oregon for Coos County, Oregon, wherein Southern Oregon Company, alleged by the Amended and Supplemental Complaint to be the assignor of the plaintiff, is plaintiff; and wherein W. W. Gage, Sheriff and Tax Collector of Coos County, Oregon, and predecessor in office of the defendant A. Johnson, Jr., is defendant.

III.

It appears from the face of the Amended and Supplemental Complaint that the Amended and Supplemental Complaint does not state facts sufficient to constitute a cause of action, and that if the plaintiff has any remedy it is by intervention in the Circuit Court of Coos County, State of Oregon, in the case of Southern Oregon Company, plaintiff, vs. W. W. Gage, Sheriff and Tax Collector, and filing a petition in said cause in the Circuit Court of Coos County, Oregon, praying for and requesting an order directing the payment of the fund paid into said Court and to said County Clerk as alleged in the Amended and Supplemental Complaint and for a distribution of the fund to the person or persons or corporate body entitled thereto.

IV.

It appears from the face of the Amended and Supplemental Complaint that the sums of money the subject matter of this action were deposited in the Circuit Court of the State of Oregon for Coos County, to be retained in said Circuit Court until the final determination of the case of United States of America against the Southern Oregon Company, formerly pending and heretofore determined by this Court, and now pending on appeal in the Circuit Court of Appeals of the United States for the Ninth Judicial Circuit, and that no final determination of said case has been had or made.

V.

That it appears from the face of the Amended and Supplemental Complaint that the moneys therein mentioned are legally due and owing from the Southern Oregon Company as taxes on lands owned by said Southern Oregon Company in Coos County, Oregon; and that said moneys and the whole thereof belong to the defendant Coos County, Oregon, and its officers charged by law with the custody and keeping of tax moneys are entitled to keep and retain the same, and that said defendant Coos County, Oregon, and these demurring defendants are entitled to apply them upon delinquent taxes of said Southern Oregon Company.

VI.

That it appears from the face of the Amended and Supplemental Complaint that the sums of money sought to be recovered, and mentioned in the Amended and Supplemental Complaint are held by or claimed by the defendant T. M. Dimmick, as County Treasurer of Coos County, Oregon, as the moneys of said Coos County; and that Coos County, Robert R. Watson, County Clerk of Coos County, A. Johnson, Jr., Sheriff of Coos County, and T. M. Dimmick, did not nor did their predecessors in office, title or interest at any time take or receive the same from the plaintiff or its assignor for the use of the plaintiff or its assignor.

VII.

It appears from the face of the Amended and Supplemental Complaint that there is a defect of

parties defendant in this, that the Circuit Court of the State of Oregon in and for the County of Coos is not a defendant herein, nor are any of the Judges thereof, to wit, either the Hon. John S. Coke, J. W. Hamilton, or G. F. Skipworth parties defendant herein, and it appears that the money and funds mentioned in said Amended and Supplemental Complaint is now in *custodia legis* and has been deposited with T. M. Dimmick, the County Treasurer herein, pursuant to the order of said Circuit Court.

LAWRENCE A. LILJEQVIST,

Attorney for Defendants Coos County,
Robert R. Watson, County Clerk of Coos
County, A. Johnson, Jr., Sheriff of Coos
County, Oregon, and T. M. Dimmick,
Treasurer of Coos County, Oregon.

I hereby certify that I am an attorney of this Court; that I have read the foregoing demurrer, and that in my opinion the same is well founded in law, and that the same is not filed for delay.

LAWRENCE A. LILJEQVIST.

Filed April 24, 1916.

G. H. MARSH,
Clerk.

And afterwards, to wit, on Monday, the 15th day of May, 1916, the same being the 61st Judicial day of the regular March, 1916, term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER SUSTAINING DEMURRERS:
JUDGMENT.

Now, at this day, come the plaintiff by Mr. John M. Gearin, of counsel, whereupon this cause comes on to be heard by the Court upon the motion of the defendants to strike out parts of the amended complaint herein, said defendants not appearing; on consideration whereof, it is ordered and adjudged that said motion be, and the same is hereby denied, and thereupon this cause comes on to be heard upon the several demurrers to said amended complaint; on consideration whereof, it is ordered and adjudged that said demurrers be, and the same are hereby sustained and that the amended complaint herein be, and the same is hereby dismissed, and that said defendants have and recover of and from said plaintiff their costs and disbursements taxed herein at \$.....

And afterwards, to wit, on the 5th day of July, 1916, there was duly filed in said Court and cause, a Petition for Writ of Error, in words and figures as follows, to wit:

PETITION FOR WRIT OF ERROR.

Now comes the Menasha Wooden Ware Company, a corporation, plaintiff herein, and says that on or about the 15th day of May, 1916, this Court entered judgment herein in favor of the defendants and against this plaintiff, sustaining the demurrers to this plaintiff's Amended Complaint and dismiss-

ing plaintiff's Amended Complaint and directing judgment for the defendants for their costs and disbursements, in which judgment and the proceedings had prior thereunto certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the Assignment of Errors which is filed with this Petition;

Wherefore, this plaintiff prays that a Writ of Error may issue in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of error so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals. And plaintiff, petitioner herein, prays that the judgment rendered in this cause as above described may be reversed, held for naught and that said cause be remanded for further proceedings.

MENASHA WOODEN WARE COMPANY,

Petitioner.

DOLPH, MALLORY, SIMON & GEARIN,

Attorneys for Petitioner.

Filed July 5, 1916.

G. H. MARSH,

Clerk.

And afterwards, to wit, on the 5th day of July, 1916, there was duly filed in said Court and cause, an Assignment of Errors, in words and figures as follows, to wit:

ASSIGNMENT OF ERRORS.

The plaintiff in this action in connection with its Petition for a Writ of Error, makes the following Assignment of Errors, which it avers occurred upon the trial of the cause, to wit:

First. The District Court of the United States for the District of Oregon erred in sustaining the demurrer of the defendants Coos County; Robert R. Watson, Clerk of Coos County; A. Johnson, Jr., Sheriff of Coos County, and T. M. Dimmick, Treasurer of Coos County, Oregon, to plaintiff's Amended Complaint.

Second. The said Court erred in sustaining the demurrer of the defendant Flanagan & Bennett Bank, to plaintiff's Amended Complaint.

Third. The said Court erred in not overruling the demurrer of the defendants Coos County; Robert R. Watson, Clerk of Coos County; A. Johnson, Jr., Sheriff of Coos County, and T. M. Dimmick, Treasurer of Coos County, Oregon, to plaintiff's Amended Complaint.

Fourth. The said Court erred in not overruling the demurrer of defendant Flanagan & Bennett Bank to plaintiff's Amended Complaint.

Fifth. The said Court erred in dismissing plaintiff's Amended Complaint.

Sixth. The said Court erred in awarding and entering judgment in favor of the defendants and against this plaintiff for costs and disbursements.

DOLPH, MALLORY, SIMON & GEARIN,
Attorneys for Plaintiff.

Filed July 5, 1916.

G. H. MARSH,
Clerk.

And afterwards, to wit, on Wednesday, the 5th day of July, 1916, the same being the 2nd Judicial day of the regular July, 1916, term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to wit:

ORDER ALLOWING WRIT OF ERROR.

On this 5th day of July, 1916, came the plaintiff, by its attorneys, and filed herein and presented to the Court, its Petition praying for the allowance of a Writ of Error intended to be urged by it and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the 9th Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the Writ of Error upon the plaintiff giving bond according to law, in the sum of Two Hundred and

Fifty Dollars, which shall operate as a supersedeas bond.

R. S. BEAN,
Judge.

Filed July 5, 1916.

G. H. MARSH,
Clerk.

And afterwards, to wit, on the 5th day of July, 1916, there was duly filed in said Court and cause, a Bond on Writ of Error, in words and figures as follows, to wit:

BOND ON WRIT OF ERROR.

Know All Men by These Presents, That the Menasha Wooden Ware Company, a corporation, as principal, and Maryland Casualty Company, a corporation organized under the laws of the State of Baltimore, and authorized to do business in the State of Oregon, as surety, are held and firmly bound unto the said defendants above named, in the full and just sum of Two Hundred and Fifty Dollars (\$250.00) to be paid to the said defendants, their attorneys, successors and assigns; to which payment well and truly to be made, we bind ourselves and our and each of our, successors and assigns, jointly and severally by these presents. Sealed with our seals and dated this 5th day of July, A. D. 1916; and,

Whereas, lately at a District Court of the United States for the District of Oregon, in a suit pending in said Court between the said plaintiff, and the defendants above named, a judgment was rendered

against the said plaintiff, and the said plaintiff having obtained a Writ of Error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the defendants above named citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in said Circuit, on the..... day of.....next.

Now, the condition of the above obligation is such, that if the said plaintiff shall prosecute said Write of Error to effect and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in the presence of:

MENASHA WOODEN WARE COMPANY,
By DOLPH, MALLORY, SIMON & GEARIN.

JNO. M. GEARIN,
Attorney.

[Seal, Maryland Casualty Company.]

MARYLAND CASUALTY COMPANY,

By GEE. S. RODGERS,
Its Attorney.

By J. F. GANNON,
Its Attorney.

Examined and approved this 5th day of July,
1916.

R. S. BEAN,
Judge.

Filed July 5, 1916.

G. H. MARSH,
Clerk.

UNITED STATES OF AMERICA, }
District of Oregon. } ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing Writ of Error, and in obedience thereto, do hereby certify that the foregoing printed transcript of record in the case in which Menasha Wooden Ware Company is plaintiff, and plaintiff in error, and the Southern Oregon Company, Flanagan & Bennett Bank, and others are defendants, and defendants in error, has been prepared by me in accordance with the law and the rules of Court, and in accordance with the direction of the praecipe for transcript filed in said cause by said plaintiff in error, and that the said transcript is a full, true and correct transcript of the record and proceedings had in said Court in said cause designated by the said praecipe to be included herein, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is \$ for printing said record, and that the same has been paid by said plaintiff in error.

In testimony hereof I have hereunto set my hand
and affixed the seal of said
Court at Portland in said
district this day
of August, 1916.

Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MENASHA WOODEN WARE COMPANY, a corporation
PLAINTIFF IN ERROR

VS.

**SOUTHERN OREGON COMPANY, a corporation; COOS
COUNTY; ROBERT R. WATSON, County Clerk of Coos
County; A. JOHNSON, Jr., Sheriff of Coos County, and
T. M. DIMMICK, Treasurer of Coos County, Oregon; and
FLANAGAN & BENNETT BANK, a Corporation**
DEFENDANTS IN ERROR

Brief on Behalf of Plaintiff in Error

**UPON WRIT OF ERROR
TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON**

DOLPH, MALLORY, SIMON & GEARIN,
Mohawk Building, Portland, Oregon,
Attorneys for Plaintiff in Error.

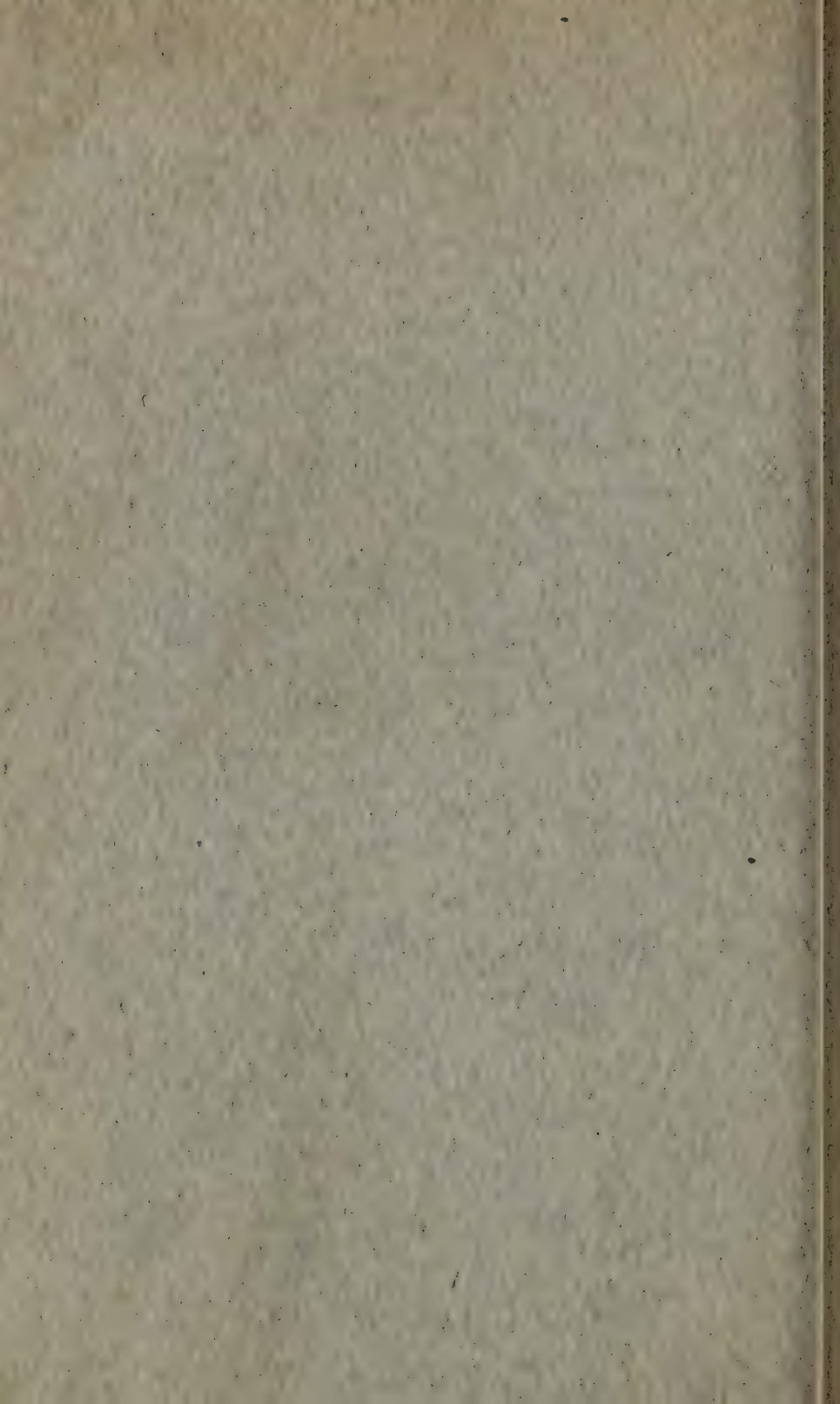
TEAL, MINOR & WINFREE
Attorneys for Flanagan & Bennett Bank

L. A. LILJEQVIST,
Attorney for Coos County, et al.

Filed

OCT 14 1916

F. D. Monckton,
Clerk.



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No.

United States Circuit Court of Appeals

For the Ninth Circuit

MENASHA WOODEN WARE COMPANY, a corporation,

Plaintiff in Error,

vs.

SOUTHERN OREGON COMPANY, a corporation;
COOS COUNTY; ROBERT R. WATSON, County Clerk of Coos County; A. JOHNSON, Jr., Sheriff of Coos County; T. M. DIMMICK, Treasurer of Coos County, Oregon, and FLANAGAN & BENNETT BANK, a corporation,

Defendants in Error.

Brief on Behalf of Plaintiff in Error

Upon Writ of Error

*to the District Court of the United States for the
District of Oregon.*

This case comes here upon a Writ of Error to the District Court of the United States for the District of Oregon to review the decision of that Court sustaining a demurrer to Plaintiff's Amended Complaint, and, plaintiff declining to plead further, in entering judgment against plaintiff for costs.

For a clear understanding of the points involved, the following concrete statement of the allegations of the complaint may be considered as accurately outlining plaintiff's position.

I.

On the second day of July, 1912, the Southern Oregon Company brought suit in the Circuit Court of the State of Oregon for Coos County against W. W. Gage, Sheriff and Tax Collector of Coos County, to restrain said Sheriff from advertising the property of the said Southern Oregon Company for sale for delinquent taxes or from issuing tax delinquency certificates against plaintiff's property.

II.

The complaint in the suit of the Southern Oregon Company against Gage, while not pleaded in the complaint in this suit, was used in the argument by both sides and its terms admitted, and it may be considered now as before the Court. That said complaint contained an offer by the Southern Oregon Company to pay into Court an amount of money equal to the taxes upon the lands of the said Southern Oregon Company, the money to be delivered to defendant (Gage) upon a contingency, which was stated as follows:

"The plaintiff is ready and willing and able to pay all moneys now appearing to be due as taxes upon said lands as shown by the tax rolls of said county either into the hands of the

Clerk of this Court or into the hands of a receiver to be appointed by this Court, and the plaintiff now brings said money into Court and offers to pay the same either into the hands of the Clerk of this Court or into the hands of a receiver to be appointed by this Court, upon an order of this Court, requiring said Clerk or receiver to hold said moneys in trust, to be delivered to defendant if it shall finally be decided by the United States Court where said cause is now pending, that said lands are subject to taxation, but to be repaid to this plaintiff in case it shall be decided by said Court that said aforesaid lands are the property of the United States of America."

That said bill of complaint prayed for an order temporarily restraining the said Gage from advertising the property of said Southern Oregon Company or from issuing delinquency tax certificates, and furthermore, prayed for an order appointing a receiver to receive the money to be so deposited by the Southern Oregon Company, and for an order requiring the defendant (Gage) to issue and deliver to said receiver tax receipts for all the taxes then due upon the lands.

III.

That immediately upon filing said complaint, and on the third day of July, 1912, the Court *ex parte* made the following order:

“This matter now coming on to be heard the Court having read the complaint herein and being fully advised in the premises and the Court being satisfied that this is the proper case for the issuance of a temporary order of injunction,

It is hereby ordered that upon the payment to the Clerk of this Court by the plaintiff, the amount of money shown by the tax rolls of Coos County, Oregon, to be due from the plaintiff as taxes upon the lands assessed to the plaintiff as owners, the defendant W. W. Gage as tax collector for said county shall also deliver to the Clerk of this Court proper tax receipts for such taxes, and the said Clerk shall hold and retain said money and tax receipts until the final determination of the case of United States of America vs. the Southern Oregon Company now pending in the Circuit Court of the United States for the District of Oregon, Ninth Judicial Circuit, in whatever court said case may be finally determined; and upon such final determination if the real estate described in the complaint shall be held to be the property of the United States then said money so deposited with the Clerk shall be returned to the plaintiff, but if it be therein decided that said real estate does not belong to the United States, then said money shall be paid over by the Court to the defendant herein;

unless it shall meanwhile be otherwise ordered by this Court.

It is further ordered that the defendant, W. W. Gage, as sheriff and tax collector of said county do hereafter refrain from advertising any of said land or any part thereof for sale for the payment of delinquent taxes and that he do refrain from issuing any tax delinquency certificates against any of said land until the further order of this Court or a Judge thereof."

IV.

That a demurrer was filed by the defendant Gage to the complaint of the Southern Oregon Company in said case. It was claimed in the argument in the Court below by defendant's counsel and is admitted by plaintiff in error, that the decision on said demurrer was delayed until the third day of July, 1914, awaiting the opinion of the Supreme Court of the State of Oregon in the case of the Southern Oregon Company against Quine, 70 Oregon, page 63. This opinion was announced March 3rd, 1914, and rehearing denied April 7th, 1914.

V.

On the third day of July, 1914, the Court made and entered the following decree :

"Comes on now to be heard the demurrer of defendant to the complaint and demurrer of defendant to the supplemental complaint and the plaintiff appearing by A. S. Hammond, one

of its attorneys, and the defendant appearing by L. A. Liljeqvist, District Attorney, his attorney, and the Court having considered said demurrer and each of them, and being advised in the premises.

It is considered, ordered and adjudged that said demurrers be and each of them is sustained.

And the plaintiff stating in open Court that it would stand upon its Complaint and Supplemental Complaint and did not desire to amend or plead further.

It is considered, ordered, adjudged and decreed that plaintiff's suit be and the same is hereby dismissed and all restraining orders heretofore entered be and the same are hereby vacated and the temporary injunction issued herein is hereby set aside and said orders revoked, and it is further decreed that defendant have and recover his costs and disbursements issued herein and that execution issue therefor."

This decree was appealed from by the Southern Oregon Company and on the 13th day of April, 1915, the Supreme Court of the State of Oregon duly affirmed said decree. (Southern Oregon Co. vs. Gage, 76 Or. p. 427.)

VI.

Neither W. W. Gage, the Sheriff in office at the time the suit of the Southern Oregon Company against Gage was brought, nor the defendant A.

Johnson, Jr., who is the present Sheriff and Tax Collector of Coos County, Oregon, ever delivered to the said Clerk of Coos County, Oregon, any tax receipts or receipt on account of any taxes referred to in the complaint of the said suit of the Southern Oregon Company against Gage.

VII.

That all the money described in the complaint in this case belongs to the plaintiff, The Menasha Wooden Ware Company, and that plaintiff has duly demanded repayment of the same to plaintiff, which demand was made upon each of the two banks, upon the Treasurer and Clerk of Coos County, and payment has been refused.

VIII.

That the said suit of the Southern Oregon Company against W. W. Gage is ended and no further order can be made therein. That Sec. 3693 and 3694, Lord's Oregon Laws, provide for the issuance of certificates of delinquency for unpaid taxes and the manner of their foreclosure. That all the certificates of delinquency issued against the property of the Southern Oregon Company for the taxes involved in the said suit of the Southern Oregon Company against Gage are now being foreclosed in the manner provided by Secs. 3693-3694, L. O. L., and this without any reference to the said suit of the Southern Oregon Company against Gage.

IX.

Under the Oregon statute providing for the taxation of property and collection of taxes, the tax on real estate can be collected only from the real estate taxed. Under the law, prior to 1907, this was different. A warrant for the collection of delinquent taxes was deemed an execution against property and might be levied on the land taxed or any other property of the delinquent taxpayer. But this was changed by the Act of the Legislature of February 28, 1907, and delinquent taxes are now collected in accordance with the terms of Sections 3693 to and including 3705, Lord's Oregon Laws, and not otherwise.

THE DEFENDANT'S CONTENTION.

While numerous demurrers and motions have been filed by the different defendants directed against the complaint, they all revolve around two propositions:

(a) An action for money had and received will not lie upon the facts set out in plaintiff's complaint.

(b) Even conceding that plaintiff has rights in the premises and is entitled to demand the return of its money, yet the money held by the banks is in *custodia legis* and therefore the plaintiff cannot sue for its recovery but must apply to the Circuit Court of Coos County for an order of distribution.

We will endeavor to answer these propositions in the order of their presentation, and, first:

ACTION FOR MONEY HAD AND RECEIVED.

The action for Money Had and Received is a quasi-equitable action and the scope of the relief granted by the Court in cases where this action lies is not restricted by any technical rule. The Court recognizes the situation in each case and by its decree meets its requirements. We cite the Court to the following authorities in support of our complaint:

“The question in an action for money had and received is, to which party does the money in equity, justice and law belong? All that plaintiff need show is that the defendant holds money which in equity and good conscience belongs to him (plaintiff).” 27 Cyc. 854.

“The rule is well settled that an action for money had and received will lie to recover money paid by plaintiff to defendant for a consideration which has wholly failed.” 27 Cyc. 855.

“In an action for money had and received it is immaterial how the money may have come into the defendant’s hands and the fact that it was received from a third person will not affect his liability, for in equity and good conscience he is not entitled to hold it against the true owner.” 27 Cyc. 864.

In *Hexter v. Poppleton*, 9 Oregon, page 483, Lord, C. J., said:

“This is an action for money had and received by the defendant to the plaintiff’s use. It is said, in general, to lie for money which, *ex saequo et bono*, the defendant ought to refund as for money paid by mistake, or upon a consideration which happens to fail, or for money obtained by imposition or extortion, or oppression, or taking an undue advantage of a party’s situation, contrary to laws made for the protection of persons under these circumstances, and a sale made with such knowledge on the part of the party who causes it to take place, renders him liable in an action for money had and received.” (Herman on Executions, Sec. 340, and authorities cited in the note.)

“Lord Mansfield calls the action of assumpsit for money had and received, ‘a liberal action founded upon large principles of equity,’ and applicable wherever the debtor, having received money, cannot conscientiously retain it.” (Moses v. McFarlone, 2 Burr. 1005.)

In *Stewart v. Phy*, 11 Oregon, pp. 335-336, the Court said:

“Payment for Special Purpose—Action for Money Had and Received. An action for money had and received, lies to recover back money paid by a debtor to his creditor, to be applied in satisfaction of a particular obligation, when

the same is not so applied, and the obligation is otherwise discharged. It is not necessary in such action to allege a promise to repay."

"It appears from the allegations that the respondent has money belonging to the appellant to the amount for which judgment is demanded, in his hands, which he clearly has no right to retain from the appellant, and we think the action lies."

Crane v. Runey, 26 Federal, pp. 15-16:

"Money Received on Erroneous Judgment.

"Where money is received on an erroneous judgment by a party thereto, the law, on a reversal of the same, raises an obligation against such party to restore the amount, which obligation may be enforced by an action as for money had and received to the use of the plaintiff therein."

"The law is well settled that on the reversal of a judgment an obligation arises on the part of the party to the record who has received the benefit of the erroneous judgment to make restitution to the other party of or for what he has thereby lost. The reversal of the judgment gives a right of action as between the parties thereto, and creates an obligation against the one who has had the benefit of the same to restore to the other what he has thereby lost. At one time it was the practice to obtain this restitution, either by a writ of restitution when

the record showed what had been lost or what money had been paid, and in other cases by a *scire facias quare restitutionem non*, issued out of the Court where the judgment was given. But with the growth of the action for money had and received, these proceedings fell into disuse, and the obligation to restore has long since been enforced by action; and under the code there is no other remedy that I am aware of." *Bank of U. S. v. Bank of Washington*, 6 Pet. 17, 19; *Clark v. Pinney*, 6 Cow. 299. And see *Yates v. Joyce*, 11 Johns, 140; *Hoster v. Poppleton*, 9 Ore. 482; *Rapalje & S. Law Dict.*, "Restitution," "Scire Facias."

Walsh v. National Broadway Bank, 32 N. Y. Supp. 734-736:

"Money Had and Received—When Lies.

"An action for money had and received lies against a bank with which money belonging to plaintiff had been deposited by a third person in his own name, and it is immaterial whether or not the bank had knowledge of the facts when it received the deposits."

"The rule must be regarded as well established by frequent decisions of the courts in this state that, so long as money or property belonging to the principal, or the proceeds thereof, may be traced and distinguished in the hands of the agent, or his representatives or assignees, the principal is entitled to recover

it, unless it has been transferred for value, without notice. In other words, when the debt created by a deposit belongs to the principal, instead of the agent who made it in his own name, the bank, upon notice of the facts, must recognize the actual, rather than the nominal, depositor. *Van Alen v. Bank*, 52 N. Y. 1; *Baker v. Bank*, 100 N. Y. 31 (2 N. E. 452); *Viets v. Bank*, 101 N. Y. 563 (5 N. E. 457); *O'Connor v. Bank*, 124 N. Y. 324, 332, 333 (26 N. E. 816); *Holmes v. Gilman*, 138 N. Y. 369 (34 N. E. 205). The case before us comes clearly within this principle. The plaintiff, by this action, seeks to recover only such a sum as remained on deposit with the defendant after notice had been given to it of the plaintiff's claim of title thereto. The case, therefore, is free from hardship to the defendant, which, at most, will be required to repay to the plaintiff only such sum as it would have been compelled to pay to her attorney at the present time if such notice had not been given; in other words, payment to the principal will absolve the defendant from making payment to the agent.

"It is immaterial whether the defendant knew of the trust when it received the deposit in question. Church, C. J., in speaking for the Court upon this subject in *Van Alen v. Bank*, *supra*, at page 10, says:

"It was suggested on the argument that notice to the bank by the depositor was neces-

sary, to protect the rights of the plaintiff, but this is not so. The title of the plaintiff does not depend upon whether the bank knew he had a title or not. That rested upon other facts. A notice to the bank might have prevented any transfer or the creation of a lien by the depositor, or prevented the bank from taking or acquiring such lien in good faith, but could not otherwise be necessary or important.' ”

And in *Roberts v. Ely*, *supra*, Andrews, J., who spoke for the Court, at page 132, 113 N. Y., and page 606, 20 N. E., said:

“It is immaterial, also, whether the original possession of the money by the defendant was rightful or wrongful. It is sufficient that the duty exists on his part, created by the circumstances, to account for and pay it over to the plaintiff.”

In *Walsh v. National Broadway Bank*, 33 N. Y. Supp. 998-999, the Court said:

“Money intrusted to an agent for specific investment, but by him diverted from its destination, and deposited in bank to his personal account, may, after demand, be recovered of the bank by the principal, in an action for money had and received, although at the time of the deposit the bank had no notice of plaintiff's right, and although at the time of the demand

the plaintiff did not present the depositor's check. 32 N. Y. Supp. 734, affirmed."

"The demurrer concedes that the money was plaintiff's, not Breck's, and that defendant holds it merely as a depository for Breck. But, being the money of plaintiff, and wrongfully deposited by Breck to his own account, by what right may the defendant retain it from the lawful owner? The answer is that by the deposit the money became the property of defendant, and it became a debtor to Breck for the money. Undoubtedly, this is the relation between Breck and the bank; but the plaintiff is not a depositor with the defendant, and the deposit of her money by Breck, as his, was utterly ineffectual to divest her title. *O'Connor v. Bank*, 124 N. Y. 324, 333, 26 N. E. 816. In the absence of estoppel, one may not be deprived of his property by the wrongful act of another. The defendant's position is as custodian of a fund to which, *ex aequo et bono*, the plaintiff is entitled; and, by virtue of elementary principles, she may reclaim it in a common-law action, even though the defendant received it without notice of her right. *Roberts v. Ely*, 113 N. Y. 128 (20 N. E. 606); *Chapman v. Forbes*, 123 N. Y. 532 (26 N. E. 3); *Bank v. Peters*, 123 N. Y. 272 (25 N. E. 319); *O'Connor v. Bank*, *supra*, *Refining Co. v. Fancher*, 145 N. Y. 552, 557, 40 N. E. 206."

Garland v. Salem Bank, 6 American Decisions

“MONEY PAID UNDER MISTAKE—The indorser of a promissory note, ignorant that a demand had not been duly made on the maker, nor due notice given, paid the amount to a bank where it was left by the holder for collection, which amount was passed to the holder's credit by the bank. Within three days, the indorser, having discovered his mistake, and the money not yet having been paid over, reclaimed it from the bank. It was held the indorser could recover the money from the bank, although after the reclamation they had paid the amount to the holder.”

In *Van Alen v. American National Bank*, 52 N. Y. 1-6-7, the Court said:

“Where an agent deposits in a bank, to his own account, the proceeds of property sold by him for his principal, under instructions thus to keep it, a trust is impressed upon the deposit in favor of the principal, and his right thereto is not affected by the fact that the agent at the same time deposits other money belonging to himself; nor is it affected by the fact that the agent, instead of depositing the identical moneys received by him on account of his principal, substitutes other moneys therefor.

“In such case, in an action brought by the principal against the bank, upon its refusal to pay upon presentation of the agent's check for the amount so deposited, the bank cannot set

up a want of privity. It is a question of title solely."

"It is said that the secret intention of Van Alen & Rice cannot effect such a result. Between them and the defendants as to the substitution it was not a secret. They in substance notified the plaintiff that they had placed on deposit the proceeds of his bonds and would keep it for him. They did deposit the amount which they treated as the proceeds, and declared it to be such. Can they deny it? Can anyone for them? If I send a note to an attorney to collect, and deposit the money in a bank in his own name and keep it for me, is my title to the money impaired because he fails to deposit the identical bills? My agent collects \$100 rent for me and puts the bills in one pocket and takes the same amount from another pocket and deposits it and notifies me. Are my rights gone by the change of money? I think not. Stripped of unsubstantial forms, the case presented is that of a person delivering stock or bonds to an agent for sale with directions to deposit the proceeds in a bank to the credit of the agent, but to keep it in that way for him, and the agent follows the directions. Can there be a doubt as to the ownership of the money as between the agent and principal? Clearly not."

In *Beardslee v. Horton*, 3 Michigan, 560-564, the Court said:

“An action for money had and received will lie where the defendant has in his possession money which in equity and good conscience belongs to the plaintiff, and it is not essential that there should be an express promise to pay, or any privity between the parties.”

“The case of *Cooper v. Wrench* was an action of assumpsit for money had and received against the sheriff, who had collected the money in an execution in favor of the plaintiff's assignor. The court held the action maintainable.”

“In the case of *Allen v. Impett*, the court say: ‘This action is brought to recover the amount of dividends of stock to which the bankrupt was entitled, and which his trustees have received since the bankruptcy and applied to various purposes; with full notice of the bankruptcy, they refused to pay the money to the assignees. There cannot be any difficulty in sustaining this action, the whole of the money having been virtually received by the trustees.’”

“In the case of *Eddy v. Smith*, it was held that a purchaser of the equity of redemption could maintain an action for the surplus in the hands of the mortgagee who was the purchaser at the mortgage sale.”

“It will be found upon examination, that it is not essential to the maintenance of this action, that there should be any express promise to pay, for the law implies a promise where justice imposes a duty.”

In *The Travellers' Insurance Company v. Health*, 95 Penn. State, 333-339, the Court said:

"Restitution is not of mere right. It is frequently a matter of grace and resting in a sound discretion. Where, therefore, the Supreme Court, upon the reversal of a judgment on which the money was made, refused to grant a writ of restitution, said refusal is not a bar to the recovery of the money, where upon a second trial the verdict was for the defendant."

"The contention in the sixth assignment is that the refusal of this court to grant a writ of restitution immediately upon the reversal of the first judgment is a bar to this action. We do not think so. Restitution is not always of right; it is frequently a matter of grace, and the refusal to grant the writ before the second trial was had, and the right of the insurance company to recover the amount of premiums collected finally determined, cannot be a bar to the present suit instituted after the first was ended. In *Harger v. Commissioners of Washington Co.*, 2 Jones, 251, it is said: 'Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it.' In refusing the order of restitution the court may have been influenced by the fact, apparent on the record, that the plaintiff in error was guilty of laches in not prosecuting his first writ of error and permit-

ting the same to be *non prossed*, whereby he lost the benefit of his writ as a supersedeas; but, on whatever ground it may have been refused, we are of opinion that the refusal at the time and under the circumstances is not a bar to the present action."

Critzer v. McConnell, 15 Illinois, 172:

"Trust Funds — Misapplication — Form of Action.—If A. pays money to B. to be applied to a particular purpose, and B. delivers the same money to C. to be applied by C. to the same purpose, if C. misapplies the money, A. may recover the money back from C. in an action for money had and received."

Lawyers' Reports, Annotated, Book 4, p. 368 (syllabus):

"AN ACTION OF ASSUMPSIT MAY BE MAINTAINED by the owner of stolen money, to recover the amount thereof against one with whom it was deposited by the thief, and who, after notice of the owner's rights, paid it upon the thief's order to third persons."

Etna Insurance Co. v. Mayor, etc., 47 N. E. 593:

"When an assessment of taxes is valid on its face, but is void in fact from lack of jurisdiction in the assessors, an action may be maintained to recover money involuntarily paid in satisfac-

tion thereof, without first demanding its return, or having the assessment set aside."

Clark v. Pinney, 6 Cowen's N. Y. 299:

"Curia per Savage, Ch. J. The important question in this case is, whether *indebitatus assumpsit* for money had and received, lies to recover money paid on an execution upon a judgment, which was afterwards reversed.

"The general proposition is, that this action lies in all cases where the defendant has in his hands money, which, *ex equo et bono*, belongs to the plaintiff. When money is collected upon an erroneous judgment, which, subsequent to the payment of the money, is reversed, the legal conclusion is irresistible that the money belongs to the person from whom it was collected. Of course, he is entitled to have it returned to him. The only question is, whether this be the proper remedy."

Cole v. Bates, 72 N. E. 333:

"An action for money had and received will lie where defendant has received money to which the plaintiff has an equitable right; plaintiff being able to trace the money in quity into defendant's hands, regardless of whether the money was deceived by defendant in the first instance."

It is apparent from these authorities that this action is properly brought for Money Had and Received for Plaintiff's Use and Benefit.

In such an action it is immaterial who deposited the money. The Court will not inquire who deposited it, how it was deposited, or when.

27 Cyc. 849.

Peterson v. Joss, 12 Ore. 81.

When the defendant has money in his possession which in equity and good conscience he cannot retain, it is unnecessary to allege a contract to pay over. The law implies the contract creates the liability and provides the means for its enforcement.

BUT A SINGLE CAUSE OF ACTION.

Something was said in the argument about two causes of action in the complaint. There is but one cause of action in each complaint.

SINGLE CAUSE OF ACTION.

When a single and continuous purpose runs through an entire transaction, made up of various acts, each of which might alone constitute a cause of action, it is proper to set up all the facts in one count as a single cause of action. 31 Cyc. 119.

In *Boyce v. Odell Commission Co.*, 107 Fed. 58, an action to recover money lost in gambling on options—an action for money had and received—when the sums claimed were paid by the plaintiff to

the defendant at various times covering a period of several months, it was held that all of the transactions were properly set up in a single cause of action, the court saying:

“It is oftentimes a nice and difficult question to determine when a given state of facts may be pleaded in a single paragraph as a single cause of action, and when those facts must be set up in separate paragraph.

“In the present case the court is of the opinion that the facts stated in the complaint constitute one continuous transaction which is properly pleaded in the single count. The bets or wagers were all in pursuance of the common purpose, to carry on a scheme of gambling in margins. * * * One single and continuous purpose evidently ran through the entire transaction.”

The court cited a number of cases from various jurisdictions to sustain this ruling.

The rule is well settled that an action for Money Had and Received will lie to recover money paid by plaintiff to defendant for a consideration which has wholly failed. 27 Cyc. 855.

In an action for Money Had and Received, it is immaterial how the money may have come into the defendant's hands, and the fact it was received from a third person will not effect his liability if, in equity and good conscience, he is not entitled to hold it against the true owner.

CUSTODIA LEGIS.

Passing now to the second point in defendants' demurrer, we will discuss the doctrine of *custodia legis*. There is no dispute between counsel for defendants and ourselves as to this doctrine, which has become so firmly grafted upon judicial procedure everywhere that it may be regarded as fixed and unchangeable. It is as to the definition of the principle upon which it rests that we differ, and the sweep of its application in the present case.

Counsel for the defendants seem to be of the opinion that when money has once come into the hands of the clerk of a court in any proceeding in that court, it must remain for all time so deposited until *that* court orders its return or distribution—and this without reference to whether or not the purpose for which it was deposited has been accomplished, and without considering at all whether the proceeding which called for its deposit has been dismissed or abandoned. This is not the law—here, or anywhere.

To the end that the Court may exercise its powers unfettered and an orderly administration of justice be had without collateral interference, it is essential that the Court's possession of things it has taken hold upon be protected so long as that possession is necessary in the proceeding in which possession was taken. When the proceeding, whatever it may be—law or equity, bankruptcy, probate or admiralty—is ended, *custodia legis* is ended at the same time, and although there may be actual

physical possession of the thing itself still remaining in the officer, the intangible, impalpable—*nolo me tangere*—of the law is lifted and the property becomes subject to attachment, replevin or assumpsit as if it had never been in *custodia legis*. And so are the authorities.

It must be remembered in any discussion of this case that the order of July 12, 1912, was an *ex parte* order made without undertaking to pass upon the *merits* of the application. It did not order the Southern Oregon Company to do anything. It *did* order the defendant W. W. Gage to do something:

“It is hereby ordered that upon the payment to the Clerk of this Court by the plaintiff the amount of money shown by the tax rolls of Coos County, Oregon, to be due from the plaintiff as taxes upon the land assessed to the plaintiff as owner, the defendant, W. W. Gage, as tax collector for said county, *shall also deliver to the Clerk of this Court proper tax receipts for such taxes*”—

is the language of the order. The defendant never did deposit the tax receipts, nor any of them. The order was made conditional upon his doing so. There was then merely an offer by the Southern Oregon Company to deposit the money in court if the defendant would deposit the tax receipts. This offer could be withdrawn at any time until acceptance, and it was never accepted. The defendant had the right to accept plaintiff's offer and deposit

the tax receipts, and if he had done so, the matter would have rested there, but he chose the other course. He denied the plaintiff's right to even make the offer—that is, he demurred to the complaint on the ground that it stated no legal reason why plaintiff should be permitted to remain in Court. Upon a hearing, his contention was sustained, plaintiff's case was dismissed, and judgment for costs entered against plaintiff. This judgment was affirmed by the Supreme Court. There is no longer any case in the Circuit Court of the State of Oregon for Coos County. There is no order to be made, or that can possibly be made concerning this money, except to give it back to the plaintiff. In 13 Cyc., p. 136, it is said:

“A deposit in Court cannot ordinarily be taken out of Court by the depositor, *but if it was made on a condition with which the other party refuses to comply, the depositor may withdraw the fund as a matter of right.*”

In support of the foregoing proposition, the case of

Cummins vs. Rapley, 17 Ark., p. 381,

is cited, and it will be seen by an examination of the case that it fully bears out the principle stated. One Cummins filed a Petition in Chancery, alleging that Charles and Abraham Rapley had filed a bill against himself and others, alleging that he, Cummins, had recovered a judgment against the Rapleys on the law side of the Court for a certain sum

of money upon a note. That one-third ($1/3$) of said debt was due and payable according to the tenor of a certain contract and deed of trust made by the Rapleys theretofore to secure the said debt, among others. That by the bill which the Rapleys filed they offered to pay the debt according to the terms of the said deed of trust, and that they asked for an injunction against the collection of the judgment, and that the petitioner in the present suit be compelled to receive the money so offered to be paid according to the terms of the deed. That when the installment of one-third ($1/3$) of the amount of the judgment became due, according to the terms of the deed, the Rapleys deposited the one-third ($1/3$) with Peay, the Clerk of the Court. That upon the hearing of the Rapleys bill, Cummins refused to accept the money under the deed, but offered to take the same as absolute payment upon the debt. That the injunction against the collection of the judgment was dissolved and the bill dismissed, and on appeal to the Supreme Court the judgment was affirmed. That after the appeal was taken, Peay, the Clerk, permitted one of the Rapleys to withdraw the money without leave of Court. Cummins claimed that the Court should have ordered the money paid on the judgment, and prayed for a rule upon the Clerk and Charles Rapley to show cause why the money should not be restored.

The response of Peay and Rapley admitted the allegations of the bill. The Court said:

“The authorities cited by appellant do not sustain his right to have the money brought again into Court and paid over upon the judgment. No doubt where a defendant brings into Court and deposits so much money as he admits to be due the plaintiff on a demand sued for, it is a payment *pro tanto*, and he has no right to withdraw it. * * * *

“But here the complainants in the chancery suit deposited with the Clerk in vacation a sum of money for a specific purpose, subject to be accepted and withdrawn by Cummins on the terms and conditions upon which it was deposited. He declined so to accept it. On the hearing the bill was dismissed, and thereby the object for which the deposit was made by complainants was defeated.

“Cummins refused to accept the money on the terms proposed, and the Court denied the relief sought. We think the Rapleys had a right to withdraw the money.”

The Supreme Court therefore affirmed the judgment of the Court below, denying the prayer of Cummins' petition that the money be restored to the Clerk.

In Harrington vs. La Rocque, 13 Ore., pp. 344, 347, the Supreme Court, by Lord, Chief Justice, said:

“It may be considered clear that when the distributor's share of an heir has been ascer-

tained and ordered paid by the Court, it is no longer regarded as in the custody of the law. The right to it has become fixed and the Executor ceases to hold it in his representative, but in his personal capacity. After distribution has been decreed, it may therefore be garnished in the hands of the Executor. And if the heir has assigned his interest or distributive share, the assignee may notify the Executor of his assignment for the purpose of requiring payment to him."

In *Fleischner vs. Bank of McMinnville*, 26 Ore., pp. 553, 561, the Supreme Court was confronted by the claim that money in the hands of an assignee for the benefit of creditors was in *custodia legis*, and the ownership could not be inquired into, but the Court said:

"A sufficient answer to the first objection is that this suit proceeds upon the theory that the assignment is fraudulent and void and therefore has no force or effect whatever. In such case the attempted assignment could not operate to place the property of the assignor in *custodia legis*, even if a valid assignment were to have that effect, and we are not advised of any rule of law which prevents a court of equity of competent jurisdiction from assuming jurisdiction upon a proper complaint to try and determine the validity of an alleged fraudulent assignment under the statute."

The lawful custody of specific property by a court of competent jurisdiction withdraws that property only *so far as necessary to accomplish the purpose of that custody, and until that purpose is accomplished* from the jurisdiction of every other Court:

Lang vs. Railroad, 160 Fed. 355;

Mound City vs. Castleman, 187 Fed. 921-924.

In Moran vs. Sturges, 154 U. S. 256, Fuller, Chief Justice, quoted from Buck vs. Colbath, 3 Wall. 334, 341, 345, as follows:

“A departure from this rule (i. e., that a court of concurrent jurisdiction will not interfere with property in custody of another court) would lead to the utmost confusion, and to endless strife between courts of concurrent jurisdiction deriving their powers from the same source. * * * *

This principle, however, has its limitations. Or, rather its just definition is to be attended to. It is only while the property is in possession of the Court, either actually or constructively, that the Court is bound, or professes to protect the possession from the process of other courts. *Whenever the litigation is ended, or the possession of the officer or Court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not.”*

In *Dunn v. Hunt*, (Minn.) 78 N. W. 1110, there was presented to the Court the question of the right to withdraw money deposited in Court to redeem from a mortgage foreclosure sale. Plaintiff had by order of Court paid into Court the money which he had tendered, amounting to \$1,262. Before the case was decided, however, he obtained an order withdrawing the money. The decision of the case was against the defendant and he immediately moved to have the order permitting plaintiff to withdraw his tender rescinded and for a further order to impound sufficient of the money so deposited to satisfy his judgment. The Court denied the defendant this relief and answering the contention made there, as here, that the money being deposited in Court could not be withdrawn because in *custodia legis*, said:

“But defendant never had any claim to or lien upon this money merely because it was paid into Court, because he always maintained a position hostile to and wholly inconsistent with any such claim and the judgment of the Court vindicates his position.”

Merwin v. Fowler, (Wash.) 56 Pac. 374.

McAlmond v. Bevington, (Wash.) 63 Pac. 251.

Leroux vs. Baldus, 13 S. W. (Texas) 1019:

In an action brought against Connolly & Co. by the Galveston, etc., R. R. Co. the latter deposited with the Clerk of the District Court the sum of \$7,226.21 to await the result of the suit. The plain-

tiff in that case recovered judgment for \$5,004.06 which the Clerk paid, leaving in his hands \$1,931.89. The plaintiffs in the above case, Leroux & Cosgrove, then sued Connolly & Co. to recover \$445.86 and garnisheed Baldus, the Clerk. They recovered judgment against Connolly and the Clerk who refused to pay over the money, and the present action was then brought against Baldus to compel the payment by him of the amount of the plaintiff's judgment, but the Clerk defended on the ground that the surplus remaining in his hands was in *custodia legis* and therefore not subject to garnishment. The Court said:

“The general rule that money or property in custody of the law is not subject to garnishment is well settled, and not questioned in this case. The reason upon which the doctrine is based is that ‘no person deriving his authority from the law, and obliged to execute it according to the rules of law, can be holden by process of this kind.’ *Brooks v. Cook*, 8 Mass. 246, cited in *Pace v. Smith*, 57 Tex. 558. But this reason does not apply to the surplus or residue remaining with the officer after he has satisfied the writ, as he no longer holds it by virtue of any legal process, and it can therefore be reached by the defendant's creditors. Money paid to the Clerk of a Court in a partition suit was held to be liable to attachment after the Court had ordered it to be paid to the parties entitled thereto. *Freem. Ex'ns*, 130; *Drake*

Attachm. 509. Such is the weight of authority on this subject. In the present case the judgment in the case of the Galveston, Houston & San Antonio Railway Company against Connolly & Co. was the authority for the payment of the amount of the judgment (\$5,004.06) to the former, and no further order to the Clerk was necessary. *The ascertained surplus, \$1,931.89, then left in the Clerk's hands, could no longer be regarded as in the custody of the law."*

Wilbur v. Flannery, 15 Atl. 203, 60 Vt. 581:

"Powers, J. In the execution of a decree of the court of chancery the defendant was ordered to deposit his deed of certain real estate in Underhill with the Clerk of that Court, upon a deposit with the Clerk for the defendant of a certain sum of money. The money and deed were both deposited with the Clerk in accordance with the decree. The deed was accepted, and taken by the party entitled, and the money was ready to be paid to the defendant when it was attached by the plaintiff. Both parties agree that money in *custodia legis* cannot be attached by the trustee process; and the inquiry is whether the legal grip upon this money had been dissolved. Our statute is broad, and subjects the goods, effects and credits of a debtor in the hands of a third person to the trustee process. The attaching creditor in such

process stands upon the right which his debtor has as against the trustee. In this case, Mr. Ray held money in his hands belonging to the defendant. As Clerk of the Court he had no further claim upon it. The purpose for which the law gave him its custody had been fully accomplished, and the only duty remaining was to pay it over to the defendant upon his call. If Mr. Ray had refused to pay it to the defendant on demand, the defendant clearly would have an action for the money. This being so, the plaintiff, as a creditor of the defendant, may reach the fund by this process. The only answer made by the defendant is that, on grounds of public policy, public officials should not be subjected to the trustee process, and this proposition is abundantly fortified by the exhaustive citation of authorities in the defendant's brief. But this case is outside the range of that proposition. Mr. Ray was a mere bailee of the money, not for the Court, nor for the parties to the litigation. As respects the deed and the money, which was to be exchanged, each for the other, he was the stakeholder appointed to effect the exchange. Any third person might as well have been appointed as the clerk. A sheriff who has collected money upon an execution is liable to the trustee process. He receives such money under color of his office, and holds it as a public officer. But his process has no further vitality when the money is collected, and he

has no remaining duty but to pay over the money. In this case, if Mr. Ray had held the money to be paid over when the Court should so order, he would be exempt from liability. But the order from the Court to pay it over antedated its receipt by him, and he was directed to pay when the deed was delivered. We can see no reason, under the language of our statute, why a clerk, under the circumstances detailed in the commissioner's report, should not be liable to the trustee process. The argument that he may be personally inconvenienced by being called away from his business applies to every other person exposed to this process. The judgment is reversed, and judgment is rendered on the report that the trustee is chargeable in the amount of the plaintiff's judgment against the principal debtor, and that the trustee recover his costs."

Dunlop vs. Patterson Fire Insurance Co., 74 N. Y. 145:

This was an appeal by James Jackson, the receiver of the property of the defendants in this action, from the order of the Supreme Court denying a motion by the receiver to set aside levies made under two attachments against the defendants or to allow the receiver to come in in the action in which the attachments were issued, for the purpose of moving to vacate the attachments, or the levies made thereunder.

The attachments were levied upon the sum of \$2,000, then in the hands of the Clerk of the City Court of Brooklyn, in lieu of an undertaking on appeal from a judgment in the action in favor of one Redfield against defendant. The appellant was appointed receiver after the levy of the attachment under and by stipulation, also made after the levy of the attachment. An order was entered in the Redfield suit settling defendant's liability, directing the Clerk to pay to the claimant therein, out of the \$2,000 on deposit, the sum of \$650, and to pay the balance thereof to defendant's attorney.

It was urged on appeal that the property which was attached in this case was in the custody of a court of record; that it was therefore incapable of being seized or levied upon by attachments and that the case was as if an attachment had been granted without the power so to do in the Court or judicial officer allowing it. The Court said:

“Doubtless the property, which was, in fact, made the subject of attachment, was in the custody of an officer of a court of record, and the appellant would at the time have had no right to remove it therefrom, or to meddle with it. But doubtless also, the appellant had a right and interest in that property, which was capable of being transferred by it, by its own act of assignment. Had it made an assignment of it, that act would not have removed it from the custody of the officer holding it, nor

would it have put upon him any greater liability than he assumed by the primary reception of it. He was liable to hold it, to answer the event of the litigation of Redfield with the appellant, and to return to the latter all that was not required to answer the proper demand of the former. And after the litigation should have been over with Redfield, would not the Clerk have been liable to the defendant for the whole of a residuum of the moneys, which liability could be enforced? And it was this last liability which would be the subject of the assignment. The claimant and real appellant, in this case, is a receiver appointed by a court in equity. He gets whatever title he has to this property, by operation of law, or by an assignment in fact, compelled by a court. Now could not that same liability be the subject of a transfer by process of law, as well as by the act of the corporation or by operation of law, and there be no illegal interference with the official power and duty of the officer holding the property? We think that it could. It may be granted that no process should have been issued which commanded the taking actual possession of the property, either exclusive of the Clerk of the City Court, or in common with him; nor, however the process was worded, should it have been executed by taking or attempting to take such possession. To such extent are some of the cases cited for the appellant. But there

was power to grant an attachment against the property of the appellant. The money in the hands of the Clerk of the City Court, or a residuary interest in it, was such property. The fund itself could not be taken away from him. It was the right to have from him, after the litigation with Redfield was ended, the whole or a residue of that money, which was such property. That right was not in the custody of that clerk, so that he could ever retain it, or, of right, pass it to another. An attachment against the appellant's property, levied upon that, took nothing out of the custody of the clerk, nor meddled with anything in his hands. It seized upon an intangible right, by means of the order of the Supreme Court and notice to the clerk of the issuance thereof. Such process and such action upon it made no conflict of jurisdiction between the two courts. The City Court held the money, with a conceded right. The officer of the Supreme Court held the right to receive it, or some of it, from the clerk, when the City Court should see fit to declare the purpose fully served for which it took it into custody."

Trotter vs. Lehigh Zinc and Iron Co., 42 N. J. Equity 456:

In certain litigation then pending involving a contract to mine and furnish ores to one of the parties being a non-resident, the whole consideration

paid out for the ores was ordered to be paid into Court as it became due so that in case the defendants, who established the right in the lower Court to set off any claim which they might have for damages, they could have this particular fund to satisfy such set-off in case there should be any decree of a pecuniary nature in favor of the complainant. The Court decided that the defendant had not the right to make such set-off; but as it was a matter of great importance to both parties, an order was made directing the retention of the moneys in the lower Court until the questions involved should be determined on appeal, in case an appeal should be taken to the Court of last resort. There was an appeal, and the Appellate Court also held that the defendants were not entitled to such set-off.

Then one Hockscher procured an attachment to be issued out of the Supreme Court of New Jersey against Trotter (the party who was entitled to the moneys which had been deposited,) which attachment was levied upon the moneys so deposited with the Clerk in the Court. The Court said:

“Trotter resists, and insists that these moneys cannot be attached, nor any right or interest of his therein. This is placed upon the ground that the money is in the custody of the law, awaiting the execution of the law. The law upon this subject is well settled in New Jersey. *There is no judgment to be enforced in*

this case. The money was paid into Court or to the Clerk as the money of Trotter; and it has been retained there ever since as his money. This being so, I think there is no doubt but that the rights and interests of Trotter therein are subject to attachment."

Weaver, Adm'r. vs. Davis, 47 Illinois Reports, pp. 235-7:

In this case the Sheriff received upon execution a certain sum of money, being more than the amount due on the judgment. An attaching creditor levied his attachment on this sum in the hands of the Sheriff and it was claimed that the money was *custodia legis*. But the Supreme Court of Illinois rejected the claim and said:

"Court—What the Court intended by this, was, manifestly that when, as an officer, he had done all that was required of him, and had paid into Court or to the plaintiff, the money collected by the writ, and that had become *functus officio*, and there was a surplus remaining in his hands which, though coming to him as an officer, he did not hold in that capacity, but as trustee for the debtor, he might be liable, as such trustee, for the surplus, in an action for money had and received, as in the case of *Pierce v. Carlton, supra*. As to the surplus, the Sheriff was but a trustee; the money was not in the custody of the law, and for it an action for money had and received could be maintained."

When property is taken lawfully by virtue of legal process it is in the custody of the law, not otherwise. (8th A. & E. Ency'l. of Law, 532.)

Gilman vs. Williams, 7 Wis. 329-334; 76 Amer. Dec. 219:

In this case the Deputy U. S. Marshal seized two horses, alleged to be the property of the plaintiff in the action and claimed by plaintiff to be exempt from execution. Plaintiff brought replevin against the Deputy U. S. Marshal. He answered that he took the horses by virtue of an execution, issued out of the District Court of the U. S., for the District of Wisconsin, and the property was, therefore, in *custodia legis* and not subject to an action of replevin in the said Court. The Supreme Court of Wisconsin rejected this claim and in a decision, which has become a leading case, held: *That it was competent for a party by replevin or otherwise to reach property although in the hands of a Marshal, Sheriff or other Court officer, and that he could recover unless the Court or Court officer established the fact that he had a legal right to retain the property for some purpose to be thereafter determined by the Court in the proceeding in which the property was taken.*

Curiously enough, this case was cited by counsel for defendant in error in the Court below as sustaining *his* contention, and we insert it here for that reason. It goes further in *our* favor than we would care to go ourselves *on the facts in that case.* But

the general principle announced in the last four lines *supra* is correct. In order to sustain his possession as being *custodia legis*, the officer must show that he has "a legal right to retain the property for some purpose to be thereafter determined by the Court whose officer he was, named in the writ."

As in every case presented to a Court, authorities might be multiplied by the hundred applying fundamental principles in the decision of cases similar in their general outline, but differing vitally in the particular facts which differentiate them. Quoted *en masse* they have a tendency to confuse more than to enlighten. We have endeavored in the foregoing citations to present only those cases which, in our judgment, meet squarely the objections urged in the demurrer. We submit that the demurrer should be overruled. The complaint is properly brought for Money Had and Received. The money is not in *custodia legis*, and there is no possible order that the Court in Coos County could make with reference to it now. The object to accomplish which it was deposited was not accomplished—can never be accomplished. The state is proceeding as it has a right to do to collect its taxes by the foreclosure of delinquency certificates against the property of the Southern Oregon Company. It has not been injured by the litigation, the certificates of delinquency bearing interest at the rate of fifteen (15) per cent, and the property must pay it. There is no lien upon this money in favor of anyone. No one claims it or can claim it except

the plaintiff. Confessedly it belongs to the plaintiff, and the refusal of defendants to pay it over on demand is unexplainable and—unconscionable.

SECTION 24—JUDICIAL CODE.

In this action counsel for Flanagan & Bennett Bank have filed a supplemental demurrer, alleging an entirely new cause of demurrer—that is, that by the terms of Section 24 of the Judicial Code this Court has no jurisdiction. The portion of the section relied upon reads as follows:

“No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee or of any subsequent holder if such instrument be payable to bearer (and be not made by any corporation), unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made.”

It is not necessary to determine whether this clause would control the Court's decision as to the \$24,752.62, or the \$3,863.26 referred to in Paragraph X of plaintiff's complaint. Perhaps it might. But clearly it has no reference whatever to the \$35,000 advanced and furnished to the Southern Oregon Company by plaintiff, which sum is also a part of the amount sued on in said Paragraph X. Neither does it apply in any way to the other suit against the First National Bank of Coos Bay. This \$35,000

always belonged to plaintiff and the title never went out of plaintiff. And the \$93,309.07 sued on in the suit against the First National Bank of Coos Bay was always plaintiff's money and never became the property of the Southern Oregon Company, or any of the defendants.

The demurrer being general must be overruled if any part of the complaint states a cause of action. *Waggy v. Scott*, 29 Ore. 388. In this case the Court said:

“The first ground of the demurrer admitted the truth of the probative facts alleged, and if the whole or any part of the complaint can be resolved into a cause of action, the general demurrer is unavailing to challenge its sufficiency. *Ketchum v. State*, 2 Ore. 103; *Toby v. Ferguson*, 3 Ore. 27; *Simpson v. Prather*, 5 Ore. 86; *Jackson v. Jackson*, 17 Ore. 110 (19 Pac. 847); *Bliss on Code Pleading*, Sec. 417. And the statement in the second count being clearly sufficient to constitute a cause of action, the court very properly overruled the general demurrer.”

In construing the statute above quoted the Court will consider the purpose of the statute and the object to be accomplished.

In *Barclay v. Levee Commissioners*, 1 Woods 254, it is said:

“This provision was intended to prevent fraudulent assignments of choses in action made for the mere purpose of giving the Court jurisdiction and was not founded upon any constitutional principle.”

In 1st Bissell, 98, it is said that this provision was incorporated into Section 24 “for the purpose of relieving Federal Courts as much as possible of enforcing local contracts and also of preventing assignments of choses in action to non-residents for the purpose of rendering defense upon the merits or a set-off less available to defendants.”

In *Goldsmith v. Holmes et al.*, 36 Fed. 484-7, tried in this Court, this statute was invoked in aid of a demurrer to the complaint as it is now invoked here, and Judge Deady said:

“The facts showing the true relations between the parties to this note, may, as between themselves, be alleged and proven by parol, for any purpose affecting either of their rights or liabilities thereon. The right of the plaintiffs ‘to recover the contents’ of this note from the defendants by an action in this Court, and the liability of the defendants therein, are among these rights and liabilities. Therefore when it is necessary, to maintain the jurisdiction of the Court in such an action, to show that the plaintiff, who upon the face of the note is in form an indorsee or assignee thereof, is in fact the payee of the same, it may be done.”

This case was affirmed in 147 U. S. 150. We quote this to show how the statute has been interpreted. The Court will not be governed by mere matter of form but will determine what are and were the "true relations" of the parties and the transactions will take character from these relations and not otherwise.

The amount in controversy here is sufficient to give the Court jurisdiction—the necessary diversity of citizenship exists—the relief sought is such as this Court can give:—the Court will not decline jurisdiction unless forced to do so in carrying out the spirit as well as the letter of the law.

This is an action for money had and received—a fact which counsel seem to be determined to forget. This money belonged to the plaintiff at all times—title never passed out of it, and upon the face of the complaint the plaintiff is entitled to demand it from anyone having it.

The narrative part of the complaint was not necessary at all, but the complaint was so drafted in order to forestall a motion for a bill of particulars. If we had declared on the common counts we would have been compelled to furnish a bill of particulars if one were demanded, and, in any event, we would have to tell this whole story on the witness stand—and it might therefore be as well told in the complaint.

It is alleged, that on the 31st day of March, 1914, we advanced and furnished the defendant Southern Oregon Company * * * \$35,000.00 * * *. This

was our money. It never ceased to be our money. We permitted its use by the Southern Oregon Company for a purpose that failed and we recalled the money. That is all there is to it.

It is true that in Paragraph XIII we have alleged that the "defendant Southern Oregon Company duly assigned to this plaintiff whatever interest it might be said to have had in said sums of money or any of them, and duly authorized this plaintiff to apply to the defendant Flanagan & Bennett Bank, or any person having possession of said moneys, or any of them, and to demand the return of the same and repayment thereof to this plaintiff." But this was not necessary. The complaint would have been perfectly good without it. The Southern Oregon Company was made a party-defendant in order that all parties might be brought into Court in the same proceeding and the full history of the transaction might appear on the face of the complaint. No claim is made here by the Southern Oregon Company and none can be made.

As conclusively appears from the authorities cited in our first brief, it is entirely immaterial in this case how the defendant got possession of this money or from whom or when. Confessedly it has possession of it and it belongs to this plaintiff and plaintiff has never parted with the title to it to anybody, and therefore assumpsit will lie.

In *Critzer v. McConnell*, 15 Ill. 172, the syllabus is:

“Trust Funds — Misapplication — Form of Action.—If A. pays money to B. to be applied to a particular purpose, and B. delivers the same money to C. to be applied to the same purpose; if C. misapplies the money, A. may recover the money back from C. in an action for money had and received.”

Applying that here it would read, that if plaintiff advanced money to the Southern Oregon Company for a particular purpose and the Southern Oregon Company gave the same money to Flanagan & Bennett Bank for the same purpose; if the Bank did not comply with that purpose, an action for money had and received may be brought.

In 47 L. R. A. 369, *Hindmarch v. Hoffman*, the money was stolen and the true owner followed it into the bank where the thief had deposited it, and an action for money had and received was sustained.

In *Van Allen v. American Nat. Bank*, 52 N. Y. 1-6-7, and *Garland v. Salem Bank*, 6 Am. Dec. 86, the same doctrine is announced, *i.e.*, the principal does not lose title to the money and may bring an action for money had and received without reference to what the agent or the party entrusted with the money, by whatever name he is known, may have done.

In this case plaintiff does not base its right upon any assignment or authorization made by the Southern Oregon Company. If the Southern Oregon Company should deny the allegation that it had assigned

“whatever interest it might be said to have had in said sum of money,” and should prove that as a matter of fact it had made no such assignment, it would not alter plaintiff’s rights in the least or prevent plaintiff from requiring the return of this money by the Bank and suing for it in assumpsit if possession was refused.

Respectfully submitted,

DOLPH, MALLORY, SIMON & GEARIN,

Attorneys for Plaintiff in Error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MENASHA WOODEN WARE COMPANY, a
corporation

Plaintiff in Error

vs.

SOUTHERN OREGON COMPANY, a corpora-
tion; COOS COUNTY; ROBERT R. WATSON,
County Clerk of Coos County; A. JOHNSON,
Jr., Sheriff of Coos County, and T. M. DIM-
MICK, Treasurer of Coos County, Oregon; and
FLANAGAN & BENNETT BANK, a Corpora-
tion,

Defendants in Error

**Brief on Behalf of Defendants in Error Coos County
and Its Officers**

Upon Writ of Error
to the District Court of the United States for
the District of Oregon

Dolph, Mallory, Simon & Gearin,
Mohawk Bldg. Portland, Ore-
gon. Attorneys for Plaintiff in
Error.

Teal, Minor & Winifree, Portland, Oregon.
Attorneys for Flanagan & Bennett Bank.

L. A. Liljeqvist, Marshfield, Oregon
Attorney for Coos County, et al.

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F. D. Monckton

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POINTS AND AUTHORITIES

I

It is the duty of the county clerk of Coos County, who by virtue of his office is ex-officio clerk of the Circuit court, having or holding in his possession or custody, public funds or money in trust for any person, by virtue of his office, or any money held in custodia legis, to, as soon as practicable pay the same over to the county treasurer. Such moneys shall be paid out in accordance with the order of the court if said money is held in custodia legis.

Chapter 273, General Laws of Oregon, 1913,
Sec. 5.

II

In the absence of such a statute it is the duty of the clerk in using due care for the protection of such funds to place them in safe keeping.

5 Ruling Case Law 629, and cases cited.
Agoure vs. Peck, 121 Pac. 708. (Cal.)

III

It was ordered by the circuit court that upon the payment to the clerk of the court by the Southern Oregon Company of the amount of money shown by the tax rolls of Coos county, Oregon to be due from the plaintiff as taxes upon the lands assessed to the said plaintiff as owners, that the sheriff should de-

liver tax receipts. (Paragraph VII, Bill of Complaint.) It is alleged that in compliance with said order of court the Southern Oregon Company drew its check payable to the order of James Watson, who was then county clerk, for the sum of \$24,752.62, and that Watson indorsed said check on July 5th, 1913 to Dimmick the county treasurer who deposited it in the Flanagan and Bennett Bank to his account as county treasurer. It is further alleged, that the same procedure was had on March 31st, 1914 with a check in the sum of \$35,000.00, also made payable to the county clerk and endorsed by him to the county treasurer and deposited by the treasurer to his account as county treasurer in the Flanagan and Bennett Bank, as well as an additional \$3,863.26, totaling \$38,863.26.

From these allegations it is very clear that the checks were negotiable and the money received from them was a deposit in the custody of the court. it was in custodia legis, ad it was the duty of the clerk to deposit this money with the county treasurer.

12 Cyc 1024.

Weaver vs. Duncan, 56 S. W. 39, 41.

Bouvier's Law Dictionary, 3rd Ed.—Custodia Legis.

In re Receivership of New Iberian Cotton Mill Co. 33 So. 903,904.

Black's Law Dictionary.—Custodia Legis.

First National Bank vs. Livingood, 109 Pac. 987, 988.

Shumaker and Longsdorff, Cyclopedic Law
Dictionary. Custodia Legis.

August vs. Gilmer, 44 S. E. 143.

Gilman vs. Williams, 76 Am. Dec. 219.

Hagan vs. Lucas, 10 Pet. 411 (35 U. S.) 9 L.
Ed. 470.

Moore Mfg. Co. vs. Billings, 80 Pac. 422, 424,
46 Or. 401.

Troll vs. City of St. Louis, 168 S. W. 167, 178.

Porter vs. Sabin, 37 L. Ed. 815, citing cases.

Farmers Loan and T. Co. vs. Lake Street E.
R. Co. 44 L. Ed. 667, 671.

177 U. S. 52, 62.

IV

It was ordered that the money be paid to the county clerk, the money was brought into court in the form of checks and certificates of deposit made payable to the county official. The checks and certificates of deposit were negotiable instruments and it was the duty of the official to convert them into money. A certified check or a certificate of deposit depends for its validity upon the solvency of the bank. This is a risk that no officer need assume, When a check or certificate of deposit is made to him as an officer under a pleading or order of court allowing the parties to deposit money, or where they plead that they bring money into court, it is the plain duty of the officer to turn the negotiable in-

strument into money. Upon its being converted into money it was the duty of the clerk to deposit it with the treasurer, who has a right to deposit it with a county depository if it is a public fund and it is his duty to do so; it is probably also the duty of the treasurer to deposit moneys held by the court in custodia legis in the county depository. It is a least proper for him to deposit them in a bank for safe keeping and his duty to do so.

5 Ruling Case Law p. 629 and cases cited.

Agoure vs. Peck, 121 Pac. 708.

Standard Encyclopedia of Procedure, Vol. 7, page 157.

Burke vs. Trewitt, 4 Fed. Cas. No. 2163.

Cyc. on Clerks of Court.

V

We contend that the fund mentioned in the Bill of Complaint was a fund in court under all the authorities, and the court in which a fund has been deposited has power to order distribution of it, and when jurisdiction is once obtained it is not lost either by the abatement of the suit or by the dismissal of the bill. The court by proper orders in the case where the fund has been brought into court will make such a disposition and distribution of the fund as is proper.

13 Cyc. 1038, cases cited.

Wright vs. Mitchell, 18 Vesey Jrs. Rep. Sumner's Ed. 293.

Sturdivant vs. Reese, 111 S. W. 261.

Standard Cyclopedia of Procedure, Vol. 7, p.
171, 170.

VI

The only remedy the Menasha Wooden Ware Company has, if they are entitled to the repayment of the money at all, is to file a petition to intervene in the case of Southern Oregon Company vs. W. W. Gage, in the Circuit Court of Coos County, Oregon, and petition the court for an order directing the payment to them of the money in question. This must be done by petition or motion, and upon notice to all the parties interested. The question as to whom the fund belongs will then be determined by the circuit court. If his decision is erroneous, the parties have their right of appeal to the Supreme Court of Oregon and possibly then by Writ of Error to the United States Supreme Court. This procedure for the return of the money is taken after final judgment and time for appeal has elapsed, and not while an appeal is pending. This procedure was taken by the Southern Oregon Company in the Circuit Court of Coos County, Oregon, and argued out before Judges J. S. Coke and G. F. Skipworth, but relief at that time was denied, due to the fact that a Writ of Error had been taken to the United States Supreme Court from the decision of the Supreme court of Oregon in the case of Southern Oregon

Company vs. W. W. Gage. No mandate had come down from the United States supreme court when this was filed and until it did no court had power to order distribution of the fund.

7 Standard Encyclopedia of Procedure 167, 170, 171, and large number of cases cited.

VII

A fund paid into court cannot be withdrawn or distributed except upon the court's order. No other court has jurisdiction to determine any question pertaining to the distribution of the fund. The rights of claimants to a fund deposited in court cannot be determined in another suit even after final decree. The court first acquiring jurisdiction of a fund has a right to retain it until the cause is finally disposed of, and its jurisdiction is not subject to be ousted by a court exercising a concurrent jurisdiction. This is particularly true of State and Federal courts. Where property is in the lawful possession of a state court, it cannot be seized by process issuing from a federal court. The state court has a right to keep property in its possession even though there are defects in the process by which it acquired possession. Property in the custody of a court is under its control and no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession or some superior jurisdiction in the premises.

This rule applies whether the property was taken upon attachment, execution, replevin, by receivership, by suits to enforce liens, to marshal assets, administer trusts, liquidation of insolvent estates or where property is voluntarily brought into court and certain action in reference thereto demanded.

Chap. 273, Laws of Ore. 1913, Sec. 5.

4 Ency of U. S. Supreme Court Reports,
1170 1172, 1173, 1175, and cases cited.

7 Standard Encyclopedia of Procedure, 167,
173, and cases cited.

Craig vs. The Governor, 43 Tenn. (3 Coldwell's Reports) 244.

Allen vs. Gerard, 21 R. I. 467, 79 Am. St. Rep.
816, 44 Atl. 592.

Covell vs. Heyman, 111 U. S. 176.

Senior vs. Pierce, 31 Fed. 625.

Tefft, Weller & Co. vs. Sternberg & Lowenherz, 5 L. R. A. 221, and notes.

Tuck vs. Manning. 5 L. R. A. 666, 22 N. E.
1001.

Martin vs. Shannonhouse, 203 Fed. 517.

Reinhold vs. Olof Hannson, 169 Ill. App. Ct.
Rep. 334.

First National Bank vs. Londonderry Mining
Co. 114 Pac. 313.

Corbitt vs. Farmers Bank of Delaware, 114
Fed. 602.

Gregory vs. Merchant's National Bank, 50 N.
E. 520.

Gregory vs. Boston Safe Deposit & Trust Co.
53 N. E. 889.

Jones vs. Merchants Nat. Bank of Boston;
Gregory vs. Same; Gregory vs. Boston Safe
Deposit & Trust Co., 76 Fed. 683.

Gregory vs. Boston Safe Deposit & Trust Co.
144 U. S. 665, 36 L. Ed. 585.

Freeman on Executions, 3rd Ed. Sec. 135, P.
606 Sec. 129.

Herman on the Law of Executions, Sec. 173.

VIII

The county treasurer and clerk of Coos County are subject to the orders of the Circuit Court of that county not to the orders of the District Court of the United States in this case. They had no power upon the demand made upon them to pay out any money deposited with them without an order of court. If they had they would have been liable to an action by Coos county or a tax payer. Officers of Coos county ready to obey the orders of the court having control of the fund cannot be harrassed by suits in another forum.

Craig vs. The Governor, *supra*.

Gregory vs. Boston Safe Deposit & Trust Co.,
76 Fed. 683.

IX

The cases cited above in Points and Authorities

VII, in themselves, effectually dispose, we believe, of every theory which can be advanced by the Menasha Wooden Ware Company for a recovery in this action. The court has no jurisdiction to try this case. Hereafter is found a complete discussion by the judges of the cases cited herein.

X

Furthermore, plaintiff has mistaken his remedy in bringing an action for money had and received. At 3 Sutherland on Pleading and Practice, Sec. 5039, it is said: "An action will lie to recover a sum certain whenever one has the money of another, which he in equity and good conscience has no right to retain. If he knows it belongs to another and knows it is his duty to pay is over, he may be sued for money had and received." In this case, there is nothing in the pleadings to show that Coos county has any money of the plaintiff, nothing to show that Alfred Johnson, Jr., Sheriff has any money of the plaintiff, nothing to show that Robert R. Watson, County Clerk has any money of the plaintiff. The complaint further shows that the money received by Dimmick the county treasurer was received from an officer of the court, the clerk. The privity between Dimmick and the court is the only privity shown. And likewise the privity between the banks and Dimmick is the only privity shown.

27 Cyc. 857, 859.

XI

Where money is paid to a person who receives it with a good conscience and uses no deceit or unfairness in obtaining it, assumpsit for money had and received will not lie to recover it.

27 Cyc. 849.

XII

The law never implies a promise to pay unless duty creates the obligation and more especially it never implies a promise to do any act contrary to duty or contrary to law. The law will not imply a promise by a public officer to pay money in his hands as such officer twice, nor to pay it to a private party in a case where the law requires him to pay it into the public treasury, and he has complied with that requirement.

Cary vs. Curtis, 3 How. 236, 249, 251, 11 L. Ed. 576.

Barr vs. Craig, 2 Dall. 151, 1 L. Ed. 327.

Rapalje vs. Armory. 2 Dall. 51, 54, 1 L. Ed. 285.

The Collector vs. Hubbard, 12 Wall. 1, 12, 20 L. Ed. 272.

XIII

Suppose this court should give a judgment to the plaintiff against the defendant T. M. Dimmick and the bank in this case. Then when the mandate

came back from the Supreme Court of the United States in the case of Southern Oregon Company vs W. W. Gage, the county should intervene and petition the court for an order applying the money deposited on the taxes due the county on the lands of the Southern Oregon Company and the court should enter a judgment and order directing the Treasurer and the Bank to pay the money over to the Sheriff to apply on delinquent taxes, what then? The mere statement shows that under the cases last cited that an action for money had and received will not lie against the defendants.

XIX

Money paid into court is an admission that the amount paid in is due on some contract or other.

9 Ency. of Plead. & Prac. 736, 735.

Brown vs. Feeney, 54 The Weekly Reporter 445.

94 Law Times Rep. N. S. 1906, p. 463.

Hosmer & Another vs. Warner, 73 Gray's Rep. 186.

Deposits in Court, Standard Cyclopedia of Procedure.

XV

There is a misjoinder of parties defendant in this case.

Cowart vs. Fender, American Annotated Cases, 1913A, p. 932.

Note to same, page 935.

ARGUMENT

It appears from the averments of the plaintiff's Amended and Supplemental Complaint that the Southern Oregon Company, the assignor of the plaintiff paid to the County Clerk of Coos County, Oregon, and who was ex-officio Clerk of the Circuit court of Coos County, Oregon, the sum of money alleged in the suit of the Southern Oregon Company vs. W. W. Gage as Sheriff and Tax Collector of Coos County, pursuant to the averments of the complaint of the Southern Oregon Company, and an order of Court made and entered in said suit, a copy of which order it set forth on pages nine and ten of the transcript of record of Plaintiff in Error. From this transcript it appears that the Southern Oregon Company owned, or claimed to own certain lands in Coos County Oregon upon which the taxes levied by the County were delinquent, and this Company, fearing that the lands might be sold for taxes by the County and not desiring to pay the taxes to the County while litigation was pending with the United States which sought to forfeit the title to all said lands and revest the same in the Government, brought the said sum of money into Court pursuant to the order above mentioned. This money was delivered by the Clerk of Coos County to the Treasurer of Coos County who has deposited the same in the defendant bank. The defense of the Defendants in

Error in this case is that the Circuit Court of Coos County Oregon has jurisdiction of this fund which is a deposit in court to the exclusion of every other court, secondly that an action for money had and received will not lie against defendants for this money, and thirdly, there is a misjoinder of parties defendant.

Section five of Chapter 273, General Laws of Oregon, 1913 provides as follows:

“It shall be the duty of all public officers excepting clerks of school districts, having and holding in their possession or custody, public funds or money in trust for any person, by virtue of their office, or any money held in custodia legis, to, as soon as practicable pay the same over to the county treasurer, if the same be held by a county officer, or to the State Treasurer, if the same be held by a State officer. . . . All moneys so paid over to the county treasurer, as aforesaid, or to the State Treasurer, as the case may be, shall be paid out by the county treasurer as the case may be, in accordance with the order of the court if said money is held in custodia legis, or to the persons to whom said money properly belongs, if otherwise held.”

California has two similar statutes, Sec. 573 of the Code of Civil Procedure, and Section 2104 of the same code. In the case of *Agoure vs. Peck*, it ap-

peared that Agoure was defendant in an action brought by one Lewis and brought into court and tendered \$1000 in the form of a certificate of deposit with the clerk to the plaintiff. The clerk kept the certificate for a time and then deposited it with the county treasurer who neglected to have it cashed. The bank on which the certificate was drawn became insolvent and the treasurer was sued on his official bond and the judgment of the lower court holding the treasurer liable was affirmed. The supreme court said:

“When the treasurer received this certificate of deposit, under the terms of the judgment of the court, he could only receive the same as money, and it was his plain duty to have reduced the money, certified to be payable upon the presentation of the certificate, to his possession and to have safely kept the same until disbursed under authority of law. Failing to do this, he was guilty not only of a violation of the law, but of gross negligence in the management and care of this property. . . . His retention of the certificate of deposit, payable upon demand, was in legal effect but a loan to the bank of the money in his possession, a thing which by law he is prohibited from doing, and he cannot be heard to excuse himself upon the ground that he acted in good faith, believing the bank to be solvent.”

Page 708, Volume 121 Pac. Rep.

5 Ruling Case Law. p. 629 cites as follows:

“The clerk of a court as a public ministerial officer is answerable in a civil action for any act of negligence or misconduct whereby damages results to the party complaining, and this liability extends not only to his own acts but to those of his deputies performed within the scope of their official duty. The principle is unquestioned that public officers should be held to a faithful performance of their official duties, and made to answer in damages to all persons who may have been injured through their malfeasance, omission or neglect, to which the persons injured have in no respect contributed, and the courts uniformly apply this law to the negligence, carelessness and misconduct of clerks of courts.”

Note in Volume 7, Standard Encyclopedia of Procedure, 157.

“Generally speaking the liability of the clerk and his bondsmen for a loss of the fund in his keeping depends on the rule of the particular jurisdiction respecting the measure of liability of public officers for moneys in their hands. Thus, we find doubt expressed as to any liability on the ground that it is not public money (Rhea vs. Brewster, 130 Ia. 729, 107 N. W. 940), while in other jurisdictions the rule of liability as in cases of bailment is upheld (Wilson

vs. People, 19 Colo. 199, 34 Pac. 944). But in some states the liability is absolute. Northern Pac. R. Co. vs Owens, 86 Minn. 188, 90 N. W. 371."

Burke vs. Trewitt, 1 Mason 96, 4 Fed. Cas. No. 2163:

"In respect to property in the custody of officers of the court, pending process, they are undoubtedly responsible for good faith and reasonable diligence. If the property be lost or injured by a negligent or dishonest execution of their trust, they are liable in damages; but they are not, of course, liable, because an embezzlement or theft is proved. They must be affected with culpable negligence or fraud, and such is the confidence the court places in its officers that perhaps the proof of such negligence, or fraud, ought to be thrown on the other party."

DEFINITIONS OF CUSTODIA LEGIS

Custody of the law. 12 Cyc. 1024.!

In the custody of the law. Bouvier's Law Dictionary, Rawle's Third Rev. Vol. 1, p. 741.

In the custody of the law

Black's Law Dictionary, (2nd Ed.) Citing:
Stockwell vs. Robinson, 32 Atl. 528.

In the custody of the law.

Shumaker and Longsdorf, Cyclopedic Law Dictionary.

Property lawfully taken by authority of legal process is in the custody of the law.

Gilman vs. Williams, 7 Wis. 329, 334, 76 Am. Dec. 219.

Weaver vs. Duncan, 56 S. W. 39, 41.

Property legally in the hands of a receiver is in custodia legis.

Weaver vs. Duncan, 56 S. W. 39, 41.

In re Receivership of New Iberia Cotton Mill Co. 33 S. 903, 904.

A thing is in custodia legis when it is shown that it has been and is subjected to the official custody of the judicial executive officer in pursuance of his execution of a legal writ, and where property attached is sold under order of the court and attachment is dissolved, the proceeds are in custodia legis.

First Nat. Bank vs. Livingood, 109 Pac. 987, 988 (Kan.)

Property levied on remains in custody of the law.

August vs. Gilmer, 44 S. E. 143.

Hagan vs. Lucas, 10 Pet. 411, (35 U. S.) 9 L. Ed. 470.

The filing of a petition in bankruptcy and the adjudication thereon operated to place the property of the bankrupt in the "custody of the law."

Moore Mfg. Co. vs. Billings, 80 Pac. 422, 424, 46 Or. 401.

One charged with crime and at large on bail is constructively in the custody of the law.

Netograph Mfg. Co. vs. Sorugham, 90 N. E. 962, 963, 197 N. Y. 377.

27 L. R. A. N. S. 333, 134 Am. St. Rep. 886.

Custodia legis involves the actual domination over some objective thing by the court. It may be corpo-

real or incorporeal, but it is not a controversy, a question, or an inquiry.

Troll vs. City of St. Louis, 168 S. W. 167, 178

Property in hands of receiver is in custodia legis

Porter vs. Sabin, 37 L. Ed. (U. S.) 815, citing cases.

FARMERS LOAN & T. CO. vs. LAKE STREET ELEVATED R. CO. 44 L. Ed. 667. 671, 177 U. S. 52, 62.

The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of other coordinate jurisdiction from exercising a like power. . . . Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and state courts.

DISTRIBUTION OF MONEY IN CUSTODIA LEGIS

13 CYC 1038.

“The court in which a fund has been deposited has power to order distribution of it, and when jurisdiction is once obtained it is not lost either by the abatement of the suit or by the dismissal of the bill.”

13 CYC 1038.

“The court in which the fund is deposited has exclusive jurisdiction of the question of the right to the moneys, and all claims against the deposit must be asserted there.”

WRIGHT vs. MITCHELL, 18 Vesey Jrs Rep. Sumner's Edition, 293. The bill was filed on behalf of the plaintiff and all other creditors of an intestate for an account, and to set aside the assignment of a lease by the intestate to two of the defendants in trust for a third. The tenants of the premises, being also made parties, paid the rent into court. The bill having been dismissed for want of prosecution, a motion was afterwards made by the assignees of the lease, that the money in Court should be paid out to them.

The Order was made: but the Register declining to draw it up, on the ground that, the Bill having

been dismissed, the Court had no jurisdiction, the motion was repeated. The Lord Chancellor (Eldon) said, the Court had jurisdiction to make an order for payment of the money out of Court, and directed the order to be drawn up.

STURDIVANT vs. REESE, 111 S. W. (Ark.) 261.

“It would be anomalous to say that a court loses power to require its commissioners to distribute funds which have come into their hands as officers of the court, and by virtue of the orders of the court. Payment under orders of the court to a commissioner or other functionary appointed by the court is equivalent to a deposit in court, and the court has exclusive jurisdiction to order a distribution.”

7 Standard Encyclopedia of Procedure. p. 169.

“The rights of claimants to a fund deposited in court cannot be determined in another suit even after final decree.”

Citing:

Gregory vs. Boston Safe Dep. & Tr. Co. 144
U. S. 665, 36 L. Ed. 585.

Corbitt vs. Farmers' Bank of Delaware, 114
Fed 602.

Allen vs. Gerard, 44 Atl. 592, 49 L. R. A. 351,
21 R. I. 467.

ID. p. 171.

“A fund paid into court cannot be withdrawn or distributed except upon the court’s order. Citing:

Hammer vs. Kaufman, 39 Ill. 87.

Walters-Cates vs. Wilkinson, 92 Ia. 129, 60 N. W. 514.

Boggs vs. Com. 76 Va. 989, following Osburn vs. U. S. 91 U. S. 474.

ID. p. 173:

“No other court has jurisdiction to determine any question pertaining to the distribution of the fund.’” Citing

CRAIG et als. vs. THE GOVERNOR, for the Use of White, Adm. 43 Tenn. (3 Coldwell’s Reports), 244.

Syllabus. A fund in custodia legis and under the control and subject to the orders and decrees of the chancery court, cannot be paid out by the Clerk and Master of the court, to any one, except in obedience to the order of the court; and a party cannot resort to a different forum and recover of the clerk and master of the chancery court and his sureties, the money, and thus oust the chancery court of its jurisdiction of the same.”

4 ENCY. of U. S. Supreme Court Rep. p. 1170.

“The court which first acquires jurisdiction of a case has a right to retain it until the cause is finally disposed of, and its jurisdiction is not

subject to be ousted by court exercising a concurrent jurisdiction."

ID. p. 1173.

"The rule that the court having possession of property has a right to deal with it to the exclusion of other courts of concurrent jurisdiction is of special importance in its application to state and federal courts. As between a state and federal court the one first seizing property has exclusive jurisdiction."

ID. p. 1175. Where property is in the lawful possession of a state court, it cannot be seized by process issuing from a federal court.

ALLEN vs. GERARD, 79 Am. St. Rep. 816, (21 R. I. 467. 44 Atl. 592.) P. 817-818. Citing Cases.

"Public officials are charged with certain well defined duties, and the law prescribes the manner in which they shall be performed. If while in the discharge of these duties, the officer is interfered with by some person who is a stranger to the proceedings, confusion and inconvenience will necessarily be the result, new complications will arise, and a multitude of suits be made possible where there should have been but one. And in order to avoid such inconvenience and confusion, the principle has very generally been established that 'no person deriving his authority from the law, and obliged to execute it according to the rules of law can be hold-

en by process of this kind.' Here the money sought to be reached is in the registry of the court, and hence undoubtedly in the custody of the law. It was placed there in pursuance of the statute. The clerk of the court, as such, has no control over it, nor is he any way liable for it, except as the custodian of the court. He holds the money in his official capacity only, and can only pay it out as ordered by the court."

COVELL vs. HEYMAN, 111 U. S. 176.

A marshal of a court of the United States had possession of property by virtue of a levy under a writ of execution issued upon a judgment recovered in a Circuit Court of the United States. An action of replevin for the property was brought against him in a state court and taken on writ of error from the decision of the Supreme Court of the state to the U. S. Supreme court. The United States supreme court after discussing *Freeman vs. Howe*, 24 How. 450 and *Taylor vs. Carrol*, 20 How. 583, says:

"The point of the decision in *Freeman vs. Howe*, *supra* is that, when property is taken and held under process, mesne or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued, for the purposes of the writ; that the possession of the officer cannot be disturbed by process from any State court, because to disturb that possession

would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person, not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds, from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, State or Federal, having jurisdiction over the parties and the subject matter. And vice versa, the same principle protects the possession of property while thus held, by process issuing from State courts, against any disturbance under process of the courts of the United States; excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and the laws of the United States." P. 179. 160.

The court then discusses subsequent decisions by that court, and quotes the following opinion from Mr. Justice Miller:

"That principle is that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under

its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises." P. 180.

The court says further:

"Here it will be perceived that no distinction is made between writs of attachment and executions upon judgments, and that the principle embraces both, as indeed both are mentioned as belonging to the same class elsewhere in the opinion." p. 181.

Again:

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States it is something more. It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they coexist in the same space, they are

independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues. 'The jurisdiction of a court,' said Chief Justice Marshall, 'is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised.'"Pages 182-183.

"Property thus levied on by attachment, or taken in execution, is brought by the writ within the scope of the jurisdiction of the court whose process it is, and as long as it remains in the possession of the officer it is in the custody of the law. It is the bare fact of that possession under claim of and color of that authority, without respect to the ultimate right, to be asserted otherwise and elsewhere, as already sufficiently explained, that furnishes to the officer complete immunity from the process of every other juris-

diction that attempts to dispossess him." p. 184.

SENIOR et al. vs. PIERCE et al. 31 Fed.
625.

Cause was before the court upon the application of the plaintiff to attach Frank Pierce for contempt. The alleged contempt consisted in the refusal of Pierce to deliver to the U. S. Marshal, in obedience to the command of a writ of replevin issued in said cause, certain spirituous liquors, valued at about \$6000, which said Pierce had seized under the Iowa liquor law, under a warrant issued from a justice of the peace court.

The court said :

"We live under two separate and distinct governments. In this respect our situation is peculiar, since there is not, perhaps, under the sun, another people subject to the rule of more than one government. While neither of the governments over us is absolutely sovereign, each is clothed with certain sovereign powers, to be exercised within the limits of the fundamental law, and each is supreme within its proper sphere. One of the most difficult problems in our polity has always been to define the limits of our two governments and keep each in its true orbit. There are, in this dual system, two judicial organizations, for the most part quite inde-

pendent of each other. With very few exceptions there is no appeal from one of these jurisdictions to the other. They have no judicial power over each other; they cannot revise each other's judgments. There is no common superior to bring their decisions into harmony, and prevent conflict between them. In most cases, the courts of the two jurisdictions exercise concurrent judicial power. They are employed in administering justice, and in enforcing the same laws, within the same territorial limits, over the same persons and subject matter. It is manifest that in so complex a judicial system there must arise, with respect to both persons and property, many causes of conflicting jurisdiction; and it were needless to dwell upon the intolerable mischiefs which must have resulted from such conflicts if they had not been averted by a wise and timely course of judicial decisions. The danger of such conflicts has been from the first imminent; and yet, the courts, state and federal, have for nearly a century exercised their judicial functions side by side, over the same people and territory, in cases mostly of concurrent jurisdiction, with but little discord, warring or conflict.

“How has this most desirable harmony been attained? We owe it beyond doubt to the wisdom of the supreme court of the United States in planting deeply in our legal system the principle that where a court of either jurisdiction

has, by legal process, custody of persons or property, the courts of the other jurisdiction shall not attempt to wrest such persons or property from the court first obtaining possession of the same. Again and again has this principle been laid down by the supreme court, as will seen by the authorities cited below. That court has put its decision upon the ground that the possession of the officer of a court under legal process is the possession of the court, and that an attempt to wrest persons or property from the custody of the officer is an invasion of the jurisdiction of the court." Citing cases. Pages 626-627.

The court then cites and quotes from decisions of the U. S. supreme court, and continues:

"Since, then, property in the hands of an officer of a court under legal process is to be con-sidered as in the custody of the court, the officer would clearly have no right to surrender it without the order of the court, to whom he owes obedience; and therefore an attempt of an officer of an alien jurisdiction to take the property out of the possession of the officer holding it must, inevitably, either prove futile or lead to a forcible collision. Would the officer in possession be justified in surrendering the property at the mandate of a court foreign to him, and without any power whatever to give him protection against the or-

ders of his own court? Would it not be his duty to resist by force the attempt of an officer of a different jurisdiction to take the property from his custody? Can the officer in possession be required to determine for himself, in advance of the judgment of his own court and of the court from which the writ of replevin issues, the right of the plaintiff suing out a replevin from an alien jurisdiction to the property in dispute, and the authority of the officer serving the writ of replevin to seize and take the property? And can an officer be adjudged to be in contempt, and punished for his disobedience to the process of an alien jurisdiction, while acting in obedience to the command of his own court, in refusing to deliver up property which he holds as the mere custodian of that court?"

"The state and federal courts of original jurisdiction are independent of each other. They are equal in power and dignity. The courts of one jurisdiction have no authority or right whatever to command or coerce the courts of the other jurisdiction. How, then, could the federal court take property from the custody of the state court, against its consent, without the use of actual force? But if one jurisdiction may use force, why not the other? Why, if the federal court may exert force to take property from the possession of a state court, may not the latter, in its turn, wrest property from the

federal court by the same means? Nothing is more evident than that whatever a federal court may lawfully do to take property from the state court the latter may also, in like circumstances, do to withdraw property from the possession of a federal court. This power, if it exists, must be reciprocal. It cannot, in the nature of things, be one-sided and exclusive in the federal courts. It would be most unreasonable for the federal courts to assert and exercise a power of seizing property in the custody of a state court, and deny to state courts of co-equal power authority to interfere in like manner with the possession of property held by a federal court. The federal tribunals would therefore but for the principle of mutual non-interference, be exposed to an invasion of their jurisdiction by the state courts, which they are certainly neither ready nor willing to permit. The evil consequences flowing from the interference of the two jurisdictions with their respective rights of possession would by no means end with the scenes of violent collision which must inevitably occur. The taking of the possession of the property by one court from another would not in the slightest degree affect the jurisdiction of the latter to hear and determine the controversy between the parties. The invaded court could not be prevented from proceeding to judgment upon the subject-matter of the suit. Hence would inevitably arise divers and con-

flicting judgments by two courts of concurrent jurisdiction upon the same controversy, and property, within the same territorial limits, without any common superior tribunal to settle and adjust the conflicting rights and titles thus created. Thus, by the judgment of a court of one jurisdiction, the right of property might be established in one suitor, while, by the decision of a court of the other jurisdiction, the title might be adjudged to his adversary; and the right of either party would be made to depend upon the forum in which it should happen to be challenged. The case was appealed from the judgment of the justice of the peace to the state district court, and the property is now, therefore, in the custody of that court. How is this court to obtain possession of it without the consent of the state district court, unless by a resort to force to wrest it from the custody of the officer of that court? Suppose we decide that the proceeding was irregular, and the seizure without warrant of law, and void, and suppose the state court shall hold just the contrary, how is the conflict of judgment between us to be settled? And, if one court or the other shall not yield, how is a collision of force to be avoided? Why should the state court, which first got possession of the property and the controversy, yield to the claim of jurisdiction by this court? By what right, law, or authority, can this court claim superiority to the state

court, or any paramount competency, to hear and determine the matter at issue?

“Inasmuch as the very purpose of non-interference is to prevent a conflict between the two jurisdictions, I can see no difference in the application of the principle whether the question to be decided by the two courts is one of jurisdiction, or of mere property right, the jurisdiction being conceded. The state court must needs decide for itself whether or not the seizure proceeding was illegal. There is no other tribunal with competent authority to decide this question for the state court. If the federal court may decide the question of the regularity of the seizure and jurisdiction adversely to the state court and proceed to take the property from its custody by force, why may not the state court reciprocally, in any parallel case, decide the same questions when property is in our custody, and proceed by writ of replevin to dispossess the marshal? But assuredly, if the federal court were in possession by legal process, it would not permit the state court to decide the question of jurisdiction and wrest the property from our control. The only safe and legitimate course for the suitor is to pursue his remedy by some proper ancillary proceeding in the court first obtaining jurisdiction, and take his appeal, if not satisfied, to the final justice of the supreme court of the state, or of the United States, as the case may require. It will not do for the

suitor to assume that he cannot obtain justice in one jurisdiction or the other. But in all events, it is infinitely better that injustice should be done and suffered in particular cases than that a course of proceeding should be sustained fraught with all the evils of conflicting judgments and forcible collisions between the two independent jurisdiction." P. 626-632.

TEFT WELLER & CO. vs. STERNBERG & LOWENHERZ 5 L. R. A. 221,—Fed,—

Bills by complainants against defendants, an insolvent firm, and J. G. Barnes, sheriff of Muscogee County, and creditors of the firm, for an injunction, receiver, etc. to take charge of the assets of said firm then in the custody of a state court, and in charge of the said sheriff, an officer of the court. The court after citing and quoting from the decisions of the U. S. Supreme court says:

"In a case like that before the court, the court first taking jurisdiction of the substance of the litigation should dispose of all the incidents. It is true that there will be, doubtless, a balance of some amount in the hands of the sheriff after the more important liens there depending are satisfied; and, this court might be justified, by the letter of the law, in appointing a receiver, to whom the sheriff would account for such balance. This, however, would not accord with that spirit of absolute reserve,

which in the matters of concurrent jurisdiction, should mark the action of the courts of the United States toward the state courts. The superior court of Muscogee county has the same power to dispose of all the matters in litigation that would obtain here. It is therefore presumably unnecessary, were it otherwise seemly and appropriate, to go forward and grant the extraordinary relief sought." Page 225.

TUCK vs. MANNING et al and Tuck, Petitioner in HOLMES vs. SAME and SOPER vs. Same, 5 L. R. A. 666, (22 N. E. 1001.)

Tuck, the plaintiff and petitioner, when he filed his bill and petitions, held a promissory note signed by Manning, and he brought the suit in equity against Manning and John Noble, the clerk of this court, to reach and apply to the payment of this note the right, title and interest of Manning in certain sums of money which had been paid into court by the plaintiffs in two suits named in the bill, in which Manning is a party defendant. The plaintiff also filed petitions in these two suits asking that the payment of money to Manning by the clerk might be stopped, and that he might have such relief as he was entitled to. These sums of money were and are held by Noble as clerk, subject to the order of the court in the suits respectively in which they were paid in; and decrees have been entered in the suits, ordering portions of the sums to be

paid to Manning, but the payments to him have not yet been made. Some time after the bill and the petitions were filed the plaintiff recovered judgment in the supreme court of New York against Manning on his promissory note in a suit which was pending when the bill and petitions were filed, and he was permitted to amend his bill by setting out this judgment. The court, by Field, J. says:

“The custody which Mr. Noble has of the money is the custody of the court and he must obey the orders of the court made in the suits respectively in which the moneys have been deposited, and he cannot be made a party to independent proceedings either in this court or in any other whereby the disposition to be made of the moneys can be affected or controlled. *Columbian Book Co. vs. De Golyer*, 115 Mass. 67; *Jones vs. Jones*. 1 Bland. Ch. 443; *Wilder vs. Bailey*, 3 Mass. 289; *Drake, Attachm. Sec. 257.*” Page 666.

D. B. MARTIN CO. vs. SHANNONHOUSE, 203 Fed. 517.

Motion made by plaintiff to order the payment to it of money in the registry. It appears from the record and affidavits filed: That at the October term, 1912, of this court, at Elizabeth City, Plaintiff recovered judgment against the defendant for the sum of about \$2100. That on or about the 16th day

of January, 1913, defendant paid to the deputy clerk at Elizabeth City the full amount of the judgment and the costs taxed against him. That soon after the payment of said amount the sheriff of Pasquotank county served upon the deputy clerk a warrant of attachment sued out of the superior court of Perquimans county in an action pending in said court, wherein the defendant H. T. Shannonhouse is plaintiff, and plaintiff D. B. Martin Company is defendant. The money was in his hands at the time said warrant was served upon said deputy clerk. It had not been deposited by him. He made with the sheriff an arrangement that the money should be deposited in the bank in the joint name of himself and said sheriff for the purpose of protecting both officers and to await the determination of the attachment proceedings. Plaintiff demanded of said deputy clerk that he pay to it the said money, which demand was refused for the reason that the same had been attached in his hands. Plaintiff, upon notice to defendant, moves the court to order the deputy clerk to pay over to it the said money notwithstanding the service upon him of the warrant of attachment. The court says:

Connor, District Judge.

“Before disposing of the question as to whether the money in the hands of the clerk was subject to attachment, it will be well to

direct the attention of the clerk and his deputies to the statutory provisions prescribing their duty in regard to funds coming into their hands by virtue of judgments or decrees of the court:

“ ‘All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court shall be forthwith deposited with the Treasurer, an assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court.’ Rev. St. 995, U. S. Comp. St. 1901, p. 711, 5 Fed. 813. Ann. 70, Fagan vs. Cullen (c.c.) 28 Fed. 843.

“It is further provided that:

“ ‘No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in, or account from which, it is drawn.’ Id. Sec. 996.

“It was the uniform custom of the several clerks in this district, and since the enactment of the Judicial Code, is now the custom of the clerk and his deputies, to immediately deposit money coming into their hands as directed by the statute. The deputy clerk at Elizabeth City, supposing some other and dif-

ferent duty under the circumstances, deposited the money to the joint credit of the sheriff and himself. In this he was in error. Under any circumstances, assuming that the money paid to him in satisfaction of the judgment was subject to attachment, or himself to garnishment, the sheriff had no authority to take the money from his possession, or interfere with him in the discharge of his official duty, as prescribed by the statute An order will be drawn directing the deputy clerk to forthwith deposit the amount received by him from defendant Shannonhouse on account of the judgment recovered by the plaintiff herein in the depository designated for that purpose. A copy of said order delivered to the bank in which it is now deposited will be sufficient authority for the withdrawal of the amount and its deposit as herein directed The question then arises, Is the money deposited in the depository designated by law to the credit of the court subject to attachment by the sheriff of Pesquotank county? The decision of this question does not call into controversy or involve the validity of the process of the state court. This court has not any such authority or power.

“The sole question is whether the money in the custody of this court is subject to be attached or this court’s control of it, in any degree, affected by the action of the sheriff in

respect to the warrant of attachment. The warrant did not direct the sheriff to levy upon, or attach, this specific money, but only the property of the defendant in his county. The power and duty of a court to decide for itself whether property in its possession or under its control can be taken from it by process issuing from another court is essential to its right and duty to administer to its suitors such remedy, as according to the law they may be entitled, and to enforce its judgments. Chief Justice Marshal, in *Wayman vs. Southard*, 10 Wheat. 1, 6 L. ed. 253, says:

“ ‘The jurisdiction of a court is not exhausted by the rendition of its judgment, but continued until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment, in which jurisdiction is to be exercised.’ ”

“It is therefore generally held that property in custodia legis is not subject to attachment. 3 Stand. Enc. Pro. 280. The question presented here has been decided in a well considered opinion in which all of the decided cases are cited, by District Judge Waddill, of the Eastern District of Virginia. In *Corbitt vs. Farmers Bank* (C. C.) 114 Fed. 602, he says:

“ ‘The position taken by counsel for complainant, that the court, having entered its final

order in respect to the money in question, had exhausted its jurisdiction over the same, and that such funds then remain subject to seizure by attachment or other legal process, as any other property belonging to defendant bank, is equally fallacious. A conclusion in favor of parties litigant, to any controversy, would be barren of good, if the court rendering the decision was powerless to cause its decrees and orders to be put into operation and duly executed; and such a result as to money in the court's own registry would indeed, leave it in a helpless and pitiable plight.'

"As clearly and forcibly pointed out by Judge Waddill, to hold otherwise would result in unseemly conflicts between state and Federal courts, involve their officers and suits in difficult and frequently doubtful questions and result in endless confusion. The courts generally hold that to permit funds in their possession to be subject to attachment would be contrary to public policy. *Clark vs. Shaw*, 26 Fed. 356; *In re Forsyth*, 78 Fed. 296.

" The statute of North Carolina directs that money paid to the clerk shall be paid by him 'to the party entitled to receive it,' whereas, money paid to the clerk of the Federal court is to be deposited by him in the depository designated to the credit of the court, and can only be drawn out *by the order of the court. It remains under the control of the court, and is*

not subject to the orders or process of any other jurisdiction. The deputy clerk should not have cancelled the judgment. His sole authority in the premises was to receive the money and deposit it, as directed. The application and disposition of it could be made only by the court."

Pages 518-521.

Reinhold vs. Olof Hansson. 169 Ill. App. Ct. Rep. 334.

Reinhold filed his bill in the Superior Court against Hansson and others to foreclose a trust deed. During pendency of suit, money due was paid into court. Thereupon the suit was dismissed without mentioning to whom the money should be paid and plaintiff appealed.

The Court said:

"Complaint is made because the decree fails to direct the payment of the money to appellant. This complaint, made as justifying this appeal, is more chimerical than substantial. The money, having been paid to the clerk with the knowledge and sanction of the court, became a fund custodia legis, to be paid out upon the order of the court. Hammer vs. Kaufman, 39 Ill. 87, Ferguson vs. Sutphon, 8 Ill. 547.

"Upon motion in the court below appellant might readily have procured an order directing

the clerk to pay the money to him, and thereby avoided this appeal. If the attention of the court had been directed to the failure of the decree to award the payment of the money to appellant, the decree would, doubtless, have been so drafted as to accomplish that result."

Page 336.

First Nat. Bank vs. Londonderry Mining Co.
114 Pac. (Col.) 313.

In a suit concerning the ownership of ores, it was ordered that the proceeds of such ores be placed in the registry fund of the court, and that the clerk deposit the fund in some bank which should be required to give a bond. Thereafter an order was entered that the moneys on deposit be equally divided between the parties, and the parties filed a petition which resulted in an order against the bank to show cause why it should not pay a specified sum. The bank filed an answer, and a trial was had which resulted in the entry of judgment against the bank. The bank contended that there was no jurisdiction, in that it was not a party to the action, and not bound by any orders others than the one to show cause and that the action must be on the bond of the bank, and its sureties, wherein a summons must issue in the name of the people and that there was no statute authorizing a judgment.

The court said:

"The first question necessary to determine pertains to the jurisdiction of the court. It is

claimed that the bank was not a party to the action, and hence was not bound by any orders of the court made in the case other than that to show cause; and, further, that if funds claimed by both parties to the suit were deposited in the bank, it was the direct interest of such parties as against the bank and which can only be enforced by an independent action upon their part. It is further contended that such action must be upon the bond of the bank and its sureties, wherein a summons must issue and run in the name of the people, etc. and that there is no statute authorizing a judgment, or decree, or motion, etc. These assignments are not well taken. If it is true, as alleged, that there are no statutory provisions regulating or providing for judgment by motion or citation in this class of cases, none are needed. It is a jurisdiction existing and which has been exercised from time immemorial. The funds borrowed were in the custody of the court and the bank which came into court and borrowed this money with knowledge of the conditions under which it was acquired made itself a quasi party to the action and was subject to the orders and decrees of the court; and is estopped to deny that it had not become such a quasi party to the suit. In such case it was not necessary that a separate suit should be brought; in fact, under repeated decisions of the federal courts, and in some states where the question has been passed upon,

it is held that no separate or outside suit could have been brought to disturb these funds."

Pages 314-315. Citing:

Corbitt vs. Farmers Bank et al, 114 Fed. 602.

Jones vs Merchants Nat. Bank, 76 Fed. 683,
35 L. R. A. 698.

Allen vs Gerard, 21 R. I. 467, 44 Atl. 592, 49
L. R. A. 351, 79 Am. St. R. 816.

Tuck vs. Manning, 150 Mass. 211, 22 N. E.
1001, 5 L. R. A. 666.

"In addition, the bank appeared and defended the action, of which it had proper notice. A citation was issued and served upon it to appear and show cause why it should not pay this money. This it did by written pleadings the same as though summons had been served upon it. A trial was had upon the very issue herein involved in which it appeared and offered its evidence and presented arguments by its counsel upon the merits of the controversy. None of its rights in this respect are complained of. The practice was complied with the same as though it had been a party to the original case. For the purposes of the disposition of these funds pertaining to which the bank was a quasi party to the action, the court had jurisdiction to render a judgment against it. Uhl vs. Vohlmann, 52 App. Div. 455, 65 N. Y. Supp.

197, Vaughn vs. Tealey, 39 S. W. 868, Fisher vs. Cunningham, 58 S. W. 399." Page 315.

CORBITT VS. FARMERS BANK OF
DELAWARE et al. 114 Fed 602.

"The question presented by the motion to abate the attachment in this cause is whether moneys paid into court pending litigation in regard theerto, and placed by order of the court in its registry or some other designated depository, pursuant to law are the subject of attachment enimating from another court. This question is one of importance, as it not only affects the orderly administration of justice in the several courts, but goes further, and tends, as in this case, to thwart and annul the carrying out of the court's judgment, in a case fully litigated, with the parties in interest before it. Money paid into the registry of the court, pursuant to law, can only be withdrawn therefrom, by the very terms of the act of congress providing for the deposit 'by the order of the judge, or the judges of said court, respectively, to be signed by such judges, or judges, and to be entered and certified of record by the clerk.' When a court causes funds to be so placed in its registry, they are to the credit of the court itself, there placed and held, to the end that its decrees and orders in respect thereto may be obeyed and carried out in accordance

with its judgment rendered; and no court, other than one having a supervisory power over the acts of such court, can by any act of its own, or any decree, order, or process emanating from it, except with its leave, assert any claim to, or secure any right in or lien upon such funds, so long as the same remain under its control. To entertain a contrary doctrine to this would not only work untold mischief and delay in legal proceedings, but would result in innumerable conflicts between the courts themselves; and the consequence would be that funds once paid into court with a view of having the rights of parties litigant thereto adjusted and determined, instead of being disposed of by the termination of the particular controversy, would be involved in an endless chain of litigation. This subject has been before the courts, state and federal, too frequently to admit now of serious cavil or doubt." Page 603-604.

"The position taken by counsel for complainant, that the court, having entered its final order in respect to the money in question, had exhausted its jurisdiction over the same, and that such funds then remain subject to seizure by attachment or other legal process, as any other property belonging to the defendant bank, is equally fallacious. A conclusion in favor of parties litigant to any controversy would be barren of good, if the court rendering the decision

was powerless to cause its decrees and orders to be put into operation and duly executed; and such a result, as to moneys in the court's own registry, would, indeed, leave it in a helpless and pitiable plight."

To same effect see *Shelton vs. Wolthausen*, 69 Atl. 1030, 1031.

GREGORY vs. MERCHANT'S NATIONAL BANK, (Mass.) 50 N. E. 520.

Bill in equity to obtain from defendant bank a sum of money received on deposit, amounting to \$18,820, which was the proceeds of a promissory note to which the plaintiff contends that he was entitled. The note was claimed by other parties. A suit at law upon it was pending in the circuit court of the United States for the First circuit, and a suit in equity was pending in the same court to determine the rights of the respective claimants to it. There was also a submission to arbitration in pais, by the parties to the suit in equity, of the questions arising in that suit, and on award under the submission, the effect of which was in dispute. In this situation it was agreed by the claimants of the note that it should be delivered to John G. Stetson, who was at that time the clerk of the circuit court of the United States for the First circuit, to be retained by him subject to the joint order of the counsel of the respective claimants. Afterwards an order was entered by the court in said suit in equity, requiring

Mr. Stetson to file the note in the action at law above referred to, and directing the maker of the note, the defendant in that action, upon and after the entry of the judgment therein, as follows: "To pay into the registry of this court the amount of said judgment . . and that said amounts be held subject to the rights of the parties claiming said note, and to abide the decision of the court in this cause." Thereupon Mr. Stetson filed the note in court in accordance with the order. Judgment was entered in the action at law upon the note for the sum of \$18,879.96, and the defendant in the action paid into court that sum in satisfaction of the judgment. On the same day, Mr. Stetson, the clerk of the court, took the money and deposited it with the defendant bank and received from the bank a pass book in the usual form, which showed that the money was deposited by the court in case No. 2435, Jones vs. Swift, which were the number and name of the action at law. All these facts are set out in the bill. A demurrer to the bill was sustained, and case appealed.

The court then cites Rev. Stat. of the U. S. Sec. 995, 996.

The court says:

"While the bill does not expressly state that the defendant bank is a designated depository of the U. S. and that the money was deposited by the clerk in accordance with his legal duty under the statute after the money had been paid into court, the averments of the bill warrant

other legal inference. It is well settled that the direct legal liability of a bank for money deposited subject to withdrawal by check is only to the depositor. *Carr vs. Bank*, 107 Mass. 45; *Bank vs. Millard*, 10 Wall. 152, *Bank vs. Dodge*, 124 U. S. 333. It is equally clear that if one seeks by a bill in equity to establish a trust in a deposit in a bank, and to set up a title adverse to the depositor, the depositor is a necessary party to the suit. To a suit in equity which has for its object the disposal of any trust fund, all known claimants of the fund must be made parties. *Williams vs. Bankhead*, 19 Wall. 563.

“The money claimed in this case was deposited by the circuit court of the United States and is held by the defendant bank subject to withdrawal only upon an order of one of the judges of that court. It is quite clear that no proper inquiry could be made in regard to the ownership of the fund without making the judges of the court parties. But the objection to the bill lies deeper than this. The money was paid into court under an order of court, and was held by the court in *custodia legis*. Whether the order under which it was paid was properly or improperly made cannot be determined upon a proceeding to obtain the money in another court. The circuit court, by virtue of the pending suit in equity, had jurisdiction of the subject and of the parties. No other court has jurisdiction of any question pertaining

to the disposition of the money which is held by that court. Claims upon the moneys are to be made in that court and to be heard and determined there. This was held in *Gregory vs. Bank*, 76 Fed. 683, 22 C. C. A. 483, a suit brought to obtain this same money. Any other doctrine would be at variance with the right of control of its own business which inheres in every court of justice, and would cause uncertainty and confusion in the determination of legal rights. It is plain that this suit cannot be maintained, because the judges of the United States court are not parties to it, and because this court has no jurisdiction to make them parties in a case of this kind, or to adjudicate upon questions which are properly cognizable only in that court. *Tuck vs. Manning*, 150 Mass. 211. 22 N. E. 1001, *Book Co. vs. De Golyer*, 115 Mass. 67. Whether the bill is fatally defective for want of other parties, on grounds intimated in *Gregory vs. Stetson*, 133 U. S. 579, 10 Sup. Ct. 422, another suit to obtain possession of the proceeds of this note, it is unnecessary to determine." P. 521-522.

GREGORY VS. BOSTON SAFE DEPOSIT & TRUST CO. 53 N. E. 889.

Suit by Gregory against defendant. It appears that a suit in equity was pending in the circuit court

of the U. S. for the first Circuit involving the ownership of two promissory notes. One of these notes, which was for \$20,334.60, with interest matured; and a suit was brought upon it in said circuit court by agreement of the claimants, and was prosecuted to judgment by their respective counsel, acting jointly. The amount of the judgment, \$24,926.90 was paid into court, and was held in the registry in satisfaction of the judgment, for the benefit of the party to whom it should be decided the note belonged. Thereupon it was ordered by the court that this sum be transferred to the cause in equity, which was brought to determine the title to the note, to remain subject to the order of the court in that cause. Afterwards the plaintiff in the present suit filed in the equity cause a motion to have the money deposited with the Boston Safe Deposit and Trust Company so that it would draw interest. The court made an order to that effect.

On June 20th, 1896, a final decree was entered in the equity cause, that the remainder of the fund be paid to Mary H. Pike, the executrix of the original defendant, Frederick A. Pike, and on Sept. 21, 1896, it was "ordered that the following property in the registry of the circuit court in this cause, deposited, subject to the order of said court, in the Merchants National Bank of Boston, and in the Boston Safe Deposit & Turst Company, amounting in all," which included the deposit now in question, be paid over to said Mary H. Pike. The plaintiff contends that this court had no jurisdiction to make this order.

The court says:

“But we see no good grounds for this contention. The money came into the registry of the court in the cause in equity, apparently with the consent of all parties. It was deposited with the defendant, subject to the order of the court, upon the plaintiff’s motion. The defendant has lawfully paid it out in accordance with the order of the court and the defendant cannot now be charged with it in a suit brought in a state court. The doctrine stated in *Gregory vs. Bank*, 171 Mass. 67, 50 N. E. 520, and in another case pending between the same parties in 22 C. C. A. 483, 76 Fed. 683, is decisive of this case.”

JONES VS. MERCHANTS NAT. BANK
OF BOSTON et al.

GREGORY VS. SAME.

GREGORY VS. BOSTON SAFE DEPOS-
IT & TRUST CO. 76 Fed. 683.

These are three bills, the first of which was filed by Charles F. Jones against the Merchants National Bank of Boston, the clerk of the circuit court, and his predecessor in office; the second by Charles A. Gregory against the Merchants National Bank of Boston and another; and the third by Charles A. Gregory against the Boston Safe Depos-

it & Trust Company and another; complainants in each case claiming title to funds in the custody of the bank and trust company as depositaries of the circuit court and praying that the same be paid over to them.

The court after going into the question as to how the money came into the custody of the defendant banks says:

“Although, in response to the propositions of the appellants, we have thus gone into the details showing that these two funds came into the custody of the respective depositaries pursuant to orders of the court, yet we are not to be understood as now impeaching the broad proposition that the essential position would in all respects be the same if it appeared only that the funds had been transferred from the court to the depositaries by the act of the clerk, under color of authority from the court, so long as the act of the clerk remained without any disavowal by the court. The funds having thus accumulated in the respective depositories, the appellants, conceiving that they had an interest therein which had not been adjudicated to them, but without obtaining the leave of the court to proceed against them or the depositaries, and without any petition to the court asking leave to intervene in the usual way, filed these three bills, one against one of the depositaries, the present clerk of the circuit court, and his predecessors in office, one against the same deposi-

tary and a person in whose favor the circuit court has decreed an interest in the funds and the third against the other depositary and also the same person named in the second. Each bill claims title to the respective funds, and prays direct relief against the respective depositories in the particulars that they may respectively be decreed to pay the respective funds to the complainants." . . .

"Our attention has been called to the want of parties, but we prefer to put our decision on such grounds as will protect the depositaries of the federal courts in this circuit from all such attempts to harass them. We doubt not these bills were filed entirely in consequence of a zealous desire to seek a remedy for a supposed right, and with no purpose beyond that. Yet the occasion requires us, now to state at large why proceedings of this character are not tolerated by the law, but only to declare the rule, so that no one can hereafter excuse himself for not regarding it. The futility of all such bills is sufficient to defeat them, because, notwithstanding the pendency of one of them, the court having control of a fund may order the entire disposition of it summarily, thus leaving nothing for the bill to act on. A bill which can reach no result except by staying the ordinary and rightful exercise of the essential functions of the court is, by its character, so futile that it ought to be dismissed for that reason alone;

but it is enough to say that the rule that bills of this sort will not be tolerated is so fundamental, and so necessary to the full exercise of judicial functions, that the reasons on which it rests need not be further stated."

The court cites another phase of the case in *Gregory vs. Pike*, 77 Fed. 241.

GREGORY VS. BOSTON SAFE DEPOSIT
& TRUST CO. 144 S. 665, 35 L. Ed.
585.

Suit was brought by Gregory and Jones against the Boston Safe Deposit and Trust Company and the Merchants National Bank and Mary H. Pike administratrix of Frederick A. Pike, deceased, to obtain the amount of a judgment on deposit with said bank and trust company. The bill was dismissed. 36 Fed. Rep. 408, 414. An appeal was taken to the United States Supreme court, the court after referring to the decree of the court below that the moneys in the hands of the defendants the Boston Safe Deposit & Trust Co. and the Merchant's Nat. Bank were held by them subject to the orders of the court in equity suit No. 2170, in which case the moneys were deposited in court and that no orders relating to said moneys can properly be made in this suit and dismissing the bill, says:

"We are of opinion that the questions attempted to be raised by the present suit should

have been presented and can be affectively determined only in equity cause No. 2170.”

DISCUSSION OF CASES CITED BY PLAINTIFF IN ERROR

Plaitiff in Error cites 13 Cyc 1036 to the effect that a deposit in court if it was made on a condition with which the other party refuses to comply may be wihtdrawn by the depositor as a matter of right, and the text refers to Cummins vs. Rapley, 17 Ark. p. 381. In reference to this authority will say, that the facts of the case show that the court never took control of this money in any form nor was any order ever made by the court in reference thereto. The Rapleys deposited certain money with the clerk, Cummins refused to accept it and after the case was decided the Rapleys withdrew the money. The money in this case cited by the defendants in error never came into custodia legis. If the law required the clerk to deposit the money with the county treasurer and the county treasurer in a county depository, and the money had been deposited with the clerk under an order of the court an entirely different question would have been presented.

The case of Harrington vs. LaRoque, 13 Or. pp. 344, which is cited by the plaintiff in error simply

holds that after the court has ordered the money paid it is no longer in custodia legis. We agree with the court and cite the same case as squarely for us. When the circuit court of Coos county, Oregon orders the money paid to the person to whom it belongs it will then, *and not sooner*, no longer be in custodia legis. "In order to complete a deposit the money must be delivered pursuant to an order of the court. Otherwise the delivery will have no legal effect." 13 Cyc 1036. "The fund must ordinarily come into the actual physical possession of the court else there is no effective deposit." 13 Cyc 1035.

This rule applies to the case of *Fleischner vs. Bank of McMinneville*, 36 Or. 553, 561 cited by plaintiff in error. Authorities have frequently held that property in the hands of an assignee for the benefit of creditors is not in custodia legis.

An examination of *Lang vs. Railroad*, 160 Fed. 355 and *Mount City vs. Castlemean*, 187 Fed 921, 924, in no wise limits the doctrine contended for by the defendants in error.

The facts in the case of *Moran vs. Sturges*, 154 U. S. 256 and in *Buck vs. Colbath*, 3 Wall. 334, 345, cited by plaintiff in error do not present a case of a court attempting to get control of property in the custody of another court after the litigation was ended. If the case of *Buck vs. Colbath*, attempts to enunciate a doctrine that when money is in the custody of the court that it ceases to be in such custody the moment final decree or judgment is en-

tered, it is dictum and is controverted by later decisions of the United States supreme court and all the authorities of state courts. That part of the quotation taken from *Buck vs. Colbath*, that when "the possession of the officer or Court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them" is correct. When litigation is ended there is generally an order or a judgment covering all deposits in court and of course when that is done other courts have jurisdiction. In the case at bar, there has never been any order of court attempting to direct any of the parties or any of the officers of the court as to the disposition of the fund, and the property is still in *custodia legis*.

In the case of *Dunn vs. Hunt*, 78 N. W. 1110 cited by plaintiff in error, the facts show that the plaintiff obtained an order allowing him to withdraw the money; of course after that the defendant could not claim that the money was still in *custodia legis* and the court was right in saying that the defendant never had any claim to or lien upon the money merely because it was paid into court.

The case of *Lerous vs. Baldus*, 13 S. W. 1019 cited by plaintiff in error is so self explanatory and so clearly not in point that we content ourselves with the citation as given by the plaintiff in error in its brief.

The same statement applies to the case of *Wilbur vs. Flannery*, 15 Atl. 203, 60 Vt. 581 cited by the plaintiff in error.

Again at section 1375, this author states:

“The action can be maintained only to recover either money or the equivalent of money. In order to maintain an action for money had and received it is necessary to establish that defendants have received money belonging to the plaintiff or to which he is in equity and good conscience entitled.”

Now applying these rules to the case at bar, we find that the circuit court of Coos County made an order that

“Upon the payment to the Clerk of this Court by the plaintiff, of the amount of money shown by the tax rolls of Coos County, Oregon, to be due from the plaintiff as taxes upon the lands assessed to the plaintiff as owners, the defendant W. W. Gage as Tax Collector for said county shall also deliver to the Clerk of this Court proper tax receipts for such taxes, and the said Clerk shall hold and retain said money and tax receipts until the final determination of the case of the United States of America vs. Southern Oregon Company now pending in the Circuit Court of the United States for the District of Oregon, Ninth Judicial Circuit, in whatever court said case may be finally determined; and upon such final determination if the real estate described in the Complaint shall be held to be the prop-

erty of the United States then said money so deposited to the Clerk shall be returned to the plaintiff, but if it be therein decided that said real estate does not belong to the United States then said money shall be paid over by the Court to the defendant herein; *unless it shall meanwhile otherwise be ordered by this Court.* It is further ordered that the defendant W. W. Gage, as Sheriff and Tax Collector of said county, do hereafter refrain from advertising any of said land or any part thereof for sale for the payment of delinquent taxes, and that he do refrain from issuing any tax delinquency certificates against any of said land until the further order of this Court or a judge thereof."

This order was made July 3rd, 1912 (Transcript of Record, p. 8) and remained in force until July 3rd, 1914 when the court made an order and decree dismissing the suit, (Transcript of Record, p. 10). The Southern Oregon Company appealed to the supreme court of Oregon which affirmed the lower court and mandate was sent down and entered on May 22nd, 1915, (Transcript of Record, p. 11.) It was not until November 30th, 1915, that the Sheriff under this litigation found himself free to issue certificates of delinquency (Transcript of Record, p. 11) and he did issue such certificates at such time and proceedings for the foreclosure of these certificates were had by the service of summons and

the filing of a complaint on March 29th, 1916. Pursuant to the order of the court the money alleged in the amended complaint was brought into court and deposited with the clerk. It then became the duty of the clerk of the court under Section 5 of Chapter 273 of the General Laws of Oregon, 1913, to deposit this money with the county treasurer and the duty of the county treasurer to place it in safe keeping with a bank in his name as county treasurer.

Now let us apply the law set forth in Elliott on Contracts aforesaid, and which is the law as enunciated by the supreme court of Oregon and the courts generally. Did the county clerk obtain this money through some mistake? Some misapprehension of the facts? Some forgetfulness of the facts? Did he obtain this money by fraud? Was he entitled to take this money when the court ordered it paid to him? When he obeyed the order of the court did he act in good conscience? When he received the money did he violate any duty when he complied with section 5 of Chapter 273 of the General Laws of Oregon, 1913, which command him to pay the money to the county treasurer?" Is the clerk under any legal obligation to pay this money to any one until the circuit court of Coos county orders it repaid?

Did the treasurer receive this money in equity and good conscience? Shall he pay it to the plaintiff on demand when the law says he shall pay it out in accordance with the order of the court? Is

he under any legal obligation to any one except the order of the Circuit Court or some court having a direct supervisory control over the circuit court, such as the supreme court of Oregon or, on writ of error from the supreme court of Oregon, the Supreme Court of the United States?

The mere statement of these questions presents the inevitable answer. An action for money had received will not lie.

MISJOINDER OF PARTIES DEFENDANT

A joint action for money had and received can be maintained only against defendants who have jointly received the money.

Coward vs. Fender, Ann. Cas, 1913, A. p. 932.

The defendants never received the money jointly. The money was paid to the clerk under the order of the court, the clerk paid it to the treasurer under the county depository law, the treasurer deposited it in one of the county depository banks under this law which now holds it subject to the county treasurer's check. Alfred Johnson, Jr., the present sheriff never received this money at all, the present county clerk only received a part of the money, Coos county, unfortunately, never received any of the money at all and is now prosecuting its tax foreclosure case to collect the taxes due on these lands.

We contend in conclusion that the plaintiff in error cannot prevail herein for the three reasons hereinbefore set out, to-wit: (1) This money is still in the custody of the circuit court of Coos county, Oregon and that court alone has power to order a distribution of the fund to the person lawfully entitled thereto; (2) None of the defendants have any money of the plaintiff which in equity and good conscience belongs to the plaintiff and which they are under a legal obligation to pay to it, the entire obligation being to the Circuit Court of Coos County, Oregon; (3) This money was never paid to the defendants jointly.

We respectfully submit that the judgment of the District Court should be affirmed.

L. A. LILJEQVIST

Attorney for Coos County, Robert R. Watson,
A. Johnson, Jr., and T. M. Dimmick.

**United States Circuit Court of Appeals
For the Ninth Circuit.**

**MENASHA WOODEN WARE COM-
PANY, a Corporation,**
Plaintiff in Error.

vs.

**SOUTHERN OREGON COMPANY, a
corporation, COOS COUNTY; RO-
BERT R. WATSON, County Clerk of
Coos County; A. JOHNSON, Jr., Sher-
iff of Coos County, and T. M. DIM-
MICK, Treasurer of Coos County,
Oregon; and FLANAGAN & BEN-
NETT BANK, a corporation,**
Defendants in Error.

**BRIEF ON BEHALF OF DEFENDANT
IN ERROR, FLANAGAN & BENNETT
BANK**

Upon Writ of Error

To the District Court of the United States
For the District of Oregon

**DOLPH, MALLORY, SIMON & GEAR-
IN,**

Attorneys for Plaintiff in Error.

TEAL, MINOR & WINFREE,

Attorneys for Flanagan & Bennett
Bank.

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IN,**

Attorneys for Plaintiff in Error.

TEAL, MINOR & WINFREE,

Attorneys for Flanagan & Bennett
Bank.

L. A. LILJEQVIST,

Attorney for Coos County, et al.

STATEMENT

This litigation began with a bill of complaint filed by the United States against the Southern Oregon Company to forfeit the title to certain lands, part of which are situated in Coos County, Oregon. In that bill of complaint it was alleged that the title to all of said lands appeared of record to be in the Southern Oregon Company. This suit was pending in the United States Courts on the second day of July, 1912, and is still pending in said Courts and undetermined, the Southern Oregon Company having appealed to the Circuit Court of Appeals.

On the second day of July, 1912, Southern Oregon Company claiming to own certain of these lands situated in Coos County, Oregon, filed its bill of complaint in the Circuit Court of the State of Oregon for Coos County in which it alleged that the sheriff and tax collector of Coos County was about to advertise and sell said lands for delinquent taxes, and prayed for an injunction.

On the third day of July, 1912, the Circuit Court for Coos County, Oregon, then having jurisdiction over the parties and the subject-matter of the said suit, upon the ex parte application of the

Southern Oregon Company entered an order restraining the sheriff and tax collector as prayed for in said suit. The same order provided for the payment to the clerk of said Court by the plaintiff of the amount of money shown by the tax rolls of Coos County, Oregon, to be due from the plaintiff as taxes upon the lands assessed to the Southern Oregon Company and that the money so paid should be held until the final determination of the suit first above mentioned, then pending in the Circuit Court of the United States for the District of Oregon. In pursuance of this order but not until March 15, 1913, Southern Oregon Company drew its check upon the Flanagan & Bennett Bank for the sum then due from the Southern Oregon Company as taxes upon the lands assessed to the Southern Oregon Company as shown by the tax rolls of Coos County, Oregon. This check was delivered to the clerk of said State Circuit Court and afterward on July 5, 1913, was endorsed by said clerk to the County Treasurer of Coos County, Oregon, and on the same day was presented for payment to the Flanagan & Bennett Bank and the same was duly paid.

Between March, 1913, and July, 1913,

the Act of the Legislative Assembly of the State of Oregon (Laws of 1913, chapter 273, page 515) went into effect. Section 5 of this Act provides that it shall be the duty of all public officers excepting clerks of school districts, having and holding in their possession or custody public funds or money in trust for any person by virtue of their office, or any money held in custodia legis to as soon as practicable pay the same over to the County Treasurer * * * and that all moneys so paid over to the County Treasurer as aforesaid shall be paid out by the County Treasurer in accordance with the order of the Court if said money is held in custodia legis or to the persons to whom said money properly belongs if otherwise held. It was in obedience of this statute that the County Clerk of Coos County, Oregon, paid to the Treasurer of said county the sum of money paid to him as County Clerk by the Southern Oregon Company on March 15, 1913.

Subsequently on March 31, 1914, the Southern Oregon Company had to its credit in the Flanagan & Bennett Bank the sum of \$3,863.26. On that date the complaint alleges that the plaintiff advanced and furnished to the Southern

Oregon Company to be used by the Southern Oregon Company in complying with the terms of said order of the Circuit Court of Coos County, Oregon, the sum of \$35,000.00, which money was deposited by the plaintiff to the credit of the Southern Oregon Company in the Flanagan & Bennett Bank on the 31st day of March, 1914. The Southern Oregon Company in order to comply with the terms of said order of the Circuit Court of Coos County, Oregon, drew its check on Flanagan & Bennett Bank in favor of the Clerk of said Circuit Court for the sum of \$38,863.26 and thereupon in pursuance of the said statute the said Clerk endorsed and delivered said check to the County Treasurer of said County and the said Treasurer endorsed said check and presented the same to the Flanagan & Bennett Bank and said Bank paid the same. The suit brought by the Southern Oregon Company against the County Treasurer of Coos County, Oregon, was afterwards dismissed but no order was made in said suit disposing of the moneys which had been paid in pursuance of the order aforesaid to the Clerk of said Circuit Court.

The Southern Oregon Company is a corporation organized under the laws of

the State of Oregon. The defendants are all, for the purposes of Federal jurisdiction, citizens of the State of Oregon. It is conceded that no final determination has been had in the suit brought by the United States of America against the Southern Oregon Company pending the final determination of which the order provides that the money should be retained by the Clerk of the Circuit Court of Coos County, Oregon.

The demurrer to the amended complaint filed on behalf of the Flanagan & Bennett Bank presents the following grounds: First, that the District Court of the United States for the District of Oregon had no jurisdiction of the subject-matter of the action; second, that it appears from the face of the complaint that the subject-matter of the action is a sum of money deposited by the Treasurer of Coos County, Oregon, in the Flanagan & Bennett Bank and held subject to the order of the Circuit Court of the State of Oregon for Coos County until the final determination of the case of United States of America against the Southern Oregon Company; third, that the complaint does not state facts sufficient to constitute a cause of action and that if

the plaintiff has any remedy such remedy is at equity and not at law.

ARGUMENT

Jurisdiction of the Court.

In so far as the sum of \$24,752.62 is concerned it is alleged by paragraph XI of the complaint that this was money legally standing to the credit of the Southern Oregon Company in the Flanagan & Bennett Bank at the time that the check was drawn upon the same and at the time that said check was paid. It is also admitted that the sum of \$3,863.26 was money belonging to the Southern Oregon Company standing to its credit in the Flanagan & Bennett Bank at the time that the check for \$38,863.26 was drawn and at the time this check was paid (complaint, paragraph XII). In the same paragraph it is alleged that the plaintiff advanced and furnished to the Southern Oregon Company to be used by the Southern Oregon Company, the sum of \$35,000.00 and that said money was deposited to the credit of the Southern Oregon Company in the Flanagan & Bennett Bank. It is further alleged that the purpose for which this money was advanced was that the same should be used by the Southern Oregon Company to comply with the order of the Circuit

Court of Coos County, Oregon. This money was so used and was by reason of the facts as alleged in this paragraph of the complaint the money of the Southern Oregon Company when the same was paid to the Clerk of the State Circuit Court.

The Flanagan & Bennett Bank therefore contends that the two sums of money for which the Southern Oregon Company gave orders or checks upon the defendant Bank in favor of the Clerk of the Circuit Court of Coos County, Oregon, could have been legally paid by this Bank only upon orders of the Southern Oregon Company. The first question therefore presented is: How could the legal title and the right to this money pass from the Southern Oregon Company to the plaintiff? It is alleged in the complaint, (paragraph XIV) that the Southern Oregon Company assigned to the plaintiff whatever interest it might be said to have in and to said sums of money or any of them and that after such assignment the plaintiff notified the defendant Bank of said assignment and demanded of the Bank the payment of all of said moneys. It is alleged that the money was the money of the Southern Oregon Company at the time the checks were drawn; that the

money was in the defendant Bank to the credit of the Southern Oregon Company and that it was paid in pursuance of the checks and of the law above cited to the party presenting such checks for payment long prior to the date on which the assignment was made to the plaintiff and long prior to the date when demand was made by the plaintiff on the defendant Bank for the same. This is shown moreover by the fact that the complaint alleges that the money was paid by the Southern Oregon Company in pursuance of the order recited on pages 4 and 5 of the brief of the plaintiff in error and this order provides that the money shall be paid by and that it was due from the Southern Oregon Company as taxes upon the lands assessed to the Southern Oregon Company. In other words the transaction shows that part of the money belonged to the Southern Oregon Company originally and that the remainder thereof was loaned to the Southern Oregon Company by the plaintiff and by virtue of such loan became the money of the Southern Oregon Company. An assignment therefore from the Southern Oregon Company to the plaintiff of this sum or these sums of money was necessary before any ownership of the

money could be said to vest in the plaintiff. Prior to that time the relation of debtor and creditor between the Southern Oregon Company and the plaintiff may have existed but the ownership of the money was in the Southern Oregon Company. This claim therefore was a chose in action and it was necessary for this assignment to be made before the plaintiff had a right to bring suit or to receive the money. Furthermore it is alleged in the complaint that the object of the suit brought by the Southern Oregon Company against the sheriff of Coos County was to obtain an injunction and that this injunction was granted upon certain conditions. It is said in the brief of the plaintiff in error (page 25) that the order of July, 1912, did not order the Southern Oregon Company to do anything but that it did order the sheriff of Coos County to do certain things. This is a narrow construction to put upon the order. It is true that the order did require the sheriff to do certain things and to refrain from doing certain things but it also required that the sheriff should only do these things and refrain from doing these things upon payment to the Clerk of the Court by the plaintiff of the sum of money which was actually paid

by the Southern Oregon Company in pursuance of the order. The Southern Oregon Company therefore when it accepted the benefit of the order did so upon the condition that it pay the money and it goes without saying that the injunction would not have been issued had not the plaintiff paid the amount as required by the order. The order of injunction was not conditioned upon the deposit of the tax receipts by the sheriff but it was conditioned upon the payment of the money by the Southern Oregon Company. The claim therefore that the tender of the money was never accepted is refuted by the fact that the money was paid to the proper person or officer and that the Southern Oregon Company availed itself of the benefit of the order.

Section 24 of the Judiciary Act of March 3, 1911 provides that no District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee * * * unless such suit might have been prosecuted in such Court to recover upon said note or other chose in action if no assignment had been made.

In *Sere et al v. Pitot et al*, Chief Justice Marshall held that the suit was one for cash bills and notes by persons to

whom the law transfers them and that the plaintiffs were assignees of a chose in action. That the term "other chose in action" is broad enough to comprehend not only assignable paper being the chose in action most usually transferred but open accounts of a merchant and like claims. This case, the leading one on this subject, has been followed without question by the Federal Courts and the decisions of these courts are gathered in

Kolze v. Hoadley, 200 U. S. 76. The only apparent departure from this rule by the Supreme Court of the United States is found in Holmes v. Goldsmith, 147 U. S. 150. In this case the general rule is reaffirmed. The decision was based upon the principle that the plaintiff who appeared to be an indorsee or assignee was in point of fact the payee of the note and that this was clearly shown by the evidence. The suit moreover was between the original parties and the court allowed evidence showing the real relation of the parties upon the principle that it did not change or vary the contract but shows what the contract really was. In this case it is said: "Certainly as against a third party who has become in good faith the holder of a promissory note a defendant, whether a maker or endorser, will not be permitted to escape

from the legal import of his formal contract by an offer of parol evidence." Here in the case at bar money was paid by the legal owner thereof to the officer in pursuance of an order of the Court, which order was procured by the Southern Oregon Company, the owner of the money and was paid for the benefit of the Southern Oregon Company. This was done before the plaintiff at bar had any claim upon this money. The title of the fund therefore passed legally from the owner. The plaintiff at the time the title passed was not the owner of the money and the title passed with its knowledge and with its consent. It was at most a creditor of the Southern Oregon Company. Prior therefore to the assignment from the Southern Oregon Company to the plaintiff the Southern Oregon Company unquestionably could have received the money from the defendant Bank if it had been entitled to the same but the plaintiff could not have received it without deraigning its title to the same by assignment.

The proposition above discussed seems so conclusive that it is scarcely necessary to present any argument in answer to other points made in the brief of plaintiff in error and these questions are so fully

presented on behalf of other defendants that the defendant Bank thinks it unnecessary to reiterate the arguments contained in the brief filed on behalf of the county and of its officers. That the money was originally paid to the Clerk of the Circuit Court of Coos County, Oregon to be held by said Clerk as Clerk of said Court is conceded. When paid therefore it was unquestionably in custodia legis. The authorities cited on behalf of the plaintiff in error are simply to the effect that when the purpose for which the money is placed in custodia legis has been accomplished, then the money may be said to be no longer in custodia legis and that the same may be recovered by the rightful owner thereof from the person in whose custody the same may be found; but the order of court provides that the money shall be kept by the Clerk of the Court, in other words shall remain in custodia legis until the final determination of that certain suit in which the United States of America is complainant and the Southern Oregon Company is defendant. The complaint does not show that this suit has ever been finally determined. The conditions therefore under which the money should be held remain. It was paid for

this purpose; it was paid to be held until the happening of a certain event. This event has not yet transpired. It therefore remains in the same condition in which it was when received. It was voluntarily paid for this particular purpose. It was accepted for this purpose and therefore no one can recover this money or has a right to this money until that event transpires, until the happening of which the money is to be so held.

This cause presents a singularly striking illustration of the wisdom of those who framed the Federal Judiciary Act. One, if not the greatest object sought by this Act was to prevent conflicts between the courts of the state and the courts of the central government. The Federal Courts have as jealously guarded the rights of the state courts as they have their own. If this action can be maintained the defendant Bank receiving this money in good faith from the person who it conceded was entitled to the same may be called upon to pay this sum of money not only upon the judgment of this court but also upon the judgment of the state court. If upon the final determination of the suit brought by the United States of America against the Southern Oregon Company the real estate assessed to the

Southern Oregon Company as owner, situated in Coos County, Oregon, and described in the bill of complaint in said suit, shall be held not to be the property of the United States then the said money under the order of the Circuit Court of Coos County, Oregon, should be paid over by the said Circuit Court to the sheriff and tax collector of Coos County, Oregon, unless it shall meanwhile be otherwise ordered by the said Circuit Court. The remedy therefore of the plaintiff in this case is to apply to the Circuit Court of Coos County, Oregon, for an order modifying the order under which the money was paid and requiring the money to be paid to the plaintiff. This it seemingly has not found fit to do but surely the innocent defendant Bank should not be put in the position of being liable to pay this large sum of money upon the order of the Circuit Court of Coos County, Oregon, and also held liable to pay the same to the plaintiff in this action.

Respectfully submitted,

TEAL, MINOR & WINFREE,
Attorneys for Flanagan & Bennett Bank.

United States
Circuit Court of Appeals
For the Ninth Circuit.

VICTOR VON ARX,

Plaintiff in Error,

vs.

W. A. SHAFER and JOHN HENSON,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Alaska, Division No. 1.

Filed

JAN 25 1917

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

VICTOR VON ARX,

Plaintiff in Error,

vs.

W. A. SHAFER and JOHN HENSON,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Alaska, Division No. 1.

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Names and Addresses of Attorneys of Record.

JOHN H. COBB, Juneau, Alaska,
Attorney for Plaintiff in Error.

CHENEY & ZIEGLER, Juneau, Alaska,
Attorneys for Defendants in Error.

*In the District Court for Alaska, Division Number
One, at Juneau.*

#1247-A.

VICTOR VON ARX,

Plaintiff,

vs.

W. A. SHAFER and JOHN HENSON,

Defendants.

Complaint.

The above-named plaintiff complaining of the
above-named defendants, for cause of action alleges:

I.

That the defendant W. A. Shafer was, at all the
time hereinafter mentioned, the city marshal of the
city of Douglas, Alaska; and the defendant John
Henson, was at such times, the city magistrate of the
said city of Douglas.

II.

That on the 11th day of September, 1914, the said
defendants, conspiring together to injure, harass,
and humiliate the plaintiff, and bring him into public
disgrace, the said Shafer, pursuant to said conspir-
acy and without any warrant, or writ of any kind,
and without official or other business of any kind,

came to the plaintiff's house in Douglas City, Alaska, and for the purpose of provoking plaintiff into some pretended violation of the law, sought to force his way into said house, and upon being told by plaintiff to leave, then and there assaulted plaintiff with a deadly weapon, to wit, a revolver, and then and there without a warrant or any legal right so to do, arrested plaintiff and confined him in the city jail, of which defendants by virtue of other offices, had custody and control.

III.

That plaintiff was arrested as aforesaid, about 11 o'clock A. M. by the said Shafer, who failed, refused and neglected to take him before [1*] the nearest, or any magistrate, as it was his duty to do, but at once confined plaintiff in the said jail. That nevertheless, plaintiff through his friends and acquaintances immediately requested and demanded of defendants, that the charges against him, if any, be examined by the said city magistrate and that he be either discharged from said arrest or admitted to bail; and plaintiff was then and there ready, willing and able to furnish any reasonable bail that might be required of him.

IV.

That defendants, pursuant to their scheme, understanding and purpose aforesaid, neglected and refused either to have plaintiff taken before a magistrate, or permit him to furnish bail, but kept him confined in said jail without any charges being pre-

*Page-number appearing at foot of page of original certified Transcript of Record.

ferred against him, and without permitting him to furnish bail, until noon of the next day. That the jail in which plaintiff was confined, was foul, dirty, ill-kept, and swarming with vermin, and plaintiff for said period of twenty-five hours was forced to undergo, the greatest physical discomfort, as well as to suffer from feelings of outrage, shame and humiliation. That during said period plaintiff was purposely and intentionally deprived by defendants, of food or drink fit for a human being, whereby his sufferings and discomfort were greatly increased. That by reason of the premises, plaintiff was damaged in the sum of one thousand dollars.

V.

That in committing the wrongs aforesaid defendants were animated solely by malice, hatred, and ill-will toward plaintiff, and deliberately and intentionally, abused the powers of the offices they respectively held, for the purpose of gratifying such malice, whereby plaintiff was damaged, and should recover the further sum of one thousand dollars as punitive or exemplary damages. [2]

Wherefore, plaintiff prays judgment for the sum of two thousand dollars, and all costs of suit.

J. H. COBB,

Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Virtor Von Arx, first being duly sworn, on oath deposes and says: I am the above-named plaintiff, and have heard read the above and foregoing complaint

and the same is true as I verily believe.

VICTOR VON ARX.

Subscribed and sworn to before me this the 25 day of March, 1915.

[Notarial Seal]

A. W. FOX,

Notary Public in and for Alaska.

My commission expires Apr. 27, 1918.

Filed in the District Court, District of Alaska,
First Division. Mar. 26, 1915. J. W. Bell, Clerk.
By —————, Deputy. [3]

In the District Court for the District of Alaska, Division Number One, at Juneau.

1247-A.

VICTOR VON ARX,

Plaintiff,

vs.

W. A. SHAFER and JOHN HENSON,

Amended Answer.

Comes now W. A. Shafer, one of the above-named defendants, and for his separate answer to the complaint of the plaintiff filed in the above-entitled cause, alleges as follows:

I.

Answering paragraph number one of said complaint defendant admits the same.

II.

Answering paragraph number two of said complaint, defendant admits that on the 11th day of September, 1914, he arrested the plaintiff in the town of

Douglas, Alaska, and denies each and every allegation and each and every part thereof in said paragraph contained, except as herein admitted.

III.

Answering paragraphs numbers three, four and five of plaintiff's complaint, defendant denies the same and each and every allegation and each and every part thereof in said paragraphs contained.

FURTHER ANSWERING SAID COMPLAINT,
AND AS AN AFFIRMATIVE DEFENSE THERE-
TO, DEFENDANT ALLEGES:

I.

That on the 11th day of September, 1914, at Douglas, Alaska, at a place within the corporate boundaries of said city of Douglas, the plaintiff, Victor Von Arx, committed a misdemeanor in violation of section 15 of ordinance number 39 of said town, by then and there using vile, profane and obscene language; that said crime was committed in the presence of defendant; that defendant was then and there the city marshal for the city of Douglas; that in the performance [4] of his duties as such officer, he then and there arrested said plaintiff, placed him in the city jail, and thereafter took him before John Henson, the city magistrate of said town of Douglas; that plaintiff was then tried and convicted for said offense.

WHEREFORE, defendant prays that plaintiff take nothing by this action, and that he recover his costs and disbursements herein expended.

Z. R. CHENEY,
Attorney for Defendant.

United States of America,
Territory of Alaska,—ss.

W. A. Shafer, being first duly sworn, on oath deposes and says: I am the defendant in the above-entitled action, have read the foregoing answer, know the contents thereof, and the same is true as I verily believe.

W. A. SHAFER,
Defendant.

Subscribed and sworn to before me this 9th day of July, 1915.

A. H. ZIEGLER,

[Notarial Seal]

Notary Public for Alaska.

My commission expires July 3, 1917.

Filed in the District Court, District of Alaska,
First Division. Jul. 10, 1915. J. W. Bell, Clerk.
By —————, Deputy. [5]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

1247-A.

VICTOR VON ARX,

Plaintiff,

vs.

W. A. SHAFER and JOHN HENSON.

Amended Answer.

Comes now John Henson, one of the above-named defendants, and for his separate answer to the com-

plaint of the plaintiff filed in the above-entitled cause, alleges as follows:

I.

Answering paragraph number one of said Complaint, defendant admits the same.

II.

Answering paragraph number two of said complaint, defendant admits that on the 11th day of September, 1914, plaintiff was arrested by W. A. Shafer, at Douglas, Alaska, and denies each and every allegation and each and every part thereof in said paragraph contained, except as herein admitted.

III.

Answering paragraphs numbers three, four and five of plaintiff's complaint, defendant denies the same and each and every allegation and each and every part thereof in said paragraphs contained.

FURTHER ANSWERING SAID COMPLAINT, AND AS AN AFFIRMATIVE DEFENSE THERETO, DEFENDANT ALLEGES:

I.

That on the 11th day of September, 1914, at Douglas, Alaska, at a place within the corporate boundaries of said city of Douglas, the plaintiff, Victor Von Arx, committed a misdemeanor in violation of section 15 of ordinance Number 39 of said town, by then and there using vile, profane and obscene language; that said crime was committed in the presence of said W. A. Shafer; that said Shafer was [6] then and there the city marshal for the city of Douglas; that in the performance of his duties as such officer, he then and there arrested said plain-

tiff, placed him in the city jail, swore out a complaint before defendant as municipal magistrate of said town of Douglas, charging plaintiff with the violation of the ordinance above-mentioned, and afterwards produced plaintiff in the court over which this defendant presides, where said plaintiff was tried and convicted for said offense.

Z. R. CHENEY,
Attorney for Defendant.

United States of America,
Territory of Alaska,—ss.

John Henson, being first duly sworn, on oath deposes and says: I am the defendant in the above-entitled action, have read the foregoing amended answer, know the contents thereof and the same is true as I verily believe.

JOHN HENSON,
Defendant.

Subscribed and sworn to before me this 9th day of July, 1915.

[Notarial Seal]

A. H. ZIEGLER,
Notary Public for Alaska.

My commission expires July 3, 1917.

Filed in the District Court, District of Alaska,
First Division. Jul. 10, 1915. J. W. Bell, Clerk.
By ————, Deputy. [7]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1247-A.

VICTOR VON ARX,

Plaintiff,

vs.

W. A. SHAFER and JOHN HANSON,

Defendants.

Reply to Amended Answer of W. A. Shafer.

Now comes the plaintiff by his attorney and for reply to the amended answer of W. A. Shafer alleges:

He denies all and singular the allegations in the affirmative defense in said answer contained except as herein expressly admitted, and alleges the facts to be: That on the 11th day of September, 1914, the said defendant, with the purpose and intention of committing the wrongs and torts in the complaint set out, went to the plaintiff's house in the city of Douglas and attempted, against the will of the plaintiff, to force his way into the same with the purpose and intention of making an excuse, if possible, for the arrest of the plaintiff; that the said defendant had no business or occasion to be at the place aforesaid, and was there solely for the purpose of committing the wrongs and torts in the complaint alleged, and was seeking and intending, as city marshal of the city of Douglas, to abuse the powers of his office in that respect; that pursuant to said purpose he did then and there, about the hour of eleven o'clock A. M. of said day, and without a warrant,

arrest the plaintiff and place him in the city jail as alleged in said complaint; but he did not take the plaintiff before [8] John Hanson, the city magistrate of the city of Douglas, until late in the following day and did not swear out a complaint against him until late in the following day. That it is true that on the trial on said complaint before John Hanson, defendant herein, and pursuant to the conspiracy alleged in the complaint, the plaintiff was convicted for an alleged violation of the ordinances of the city of Douglas, by the said John Hanson, but on an appeal from said conviction and judgment, same was set aside by the District Court for Alaska on the ground that the evidence failed to show any crime or violation of said ordinances and the plaintiff was discharged with his costs in that behalf, all of which is manifest from the record therein.

J. H. COBB,

Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Victor Von Arx, being first duly sworn, on oath deposes and says: I am the plaintiff in the above-entitled action. I have heard read the foregoing answer and the same is true as I verily believe.

VICTOR VON ARX.

Subscribed and sworn to before me this 15th day of July, 1915.

[Notarial Seal]

E. L. COBB,

Notary Public in and for Alaska.

My commission expires Dec. 3, 1918.

Filed in the District Court, District of Alaska,
First Division. Jul. 15, 1915. J. W. Bell, Clerk.
By ———, Deputy. [9]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1247-A.

VICTOR VON ARX,

Plaintiff,

vs.

W. A. SHAFER and JOHN HANSON,

Defendants.

**Reply to Amended Answer of the Defendant John
Hanson.**

Now comes the plaintiff by his attorney and for
reply to the affirmative defense alleged in the answer
of the defendant John Hanson says:

He denies all and singular the allegations in the
said affirmative answer contained, except as herein-
after expressly admitted and alleged, and alleges that
the truth concerning said matter is as follows, to wit:

That on the 11th day of September, 1914, the said
W. A. Shafer, codefendant herein, came to the plain-
tiff's house for the purpose of arresting the plain-
tiff and for the purpose and as an excuse for the
wrongs and torts he intended to commit, attempted
to force an entrance into the said house and provoke
the plaintiff, if possible, into committing some sup-
posed violation of the ordinances of the city of
Douglas. That at said time and place the said

Shafer did arrest the plaintiff and place him in the city jail, that said arrest was not made in the performance of his duties as city marshal, but solely pursuant to his preconceived scheme and intent to wrong and humiliate the plaintiff, as alleged in the complaint herein. That the said Shafer did not swear out a complaint against the plaintiff until the following [10] day and did not produce the plaintiff in the court over which the defendant presided. It is true that pursuant to the plan and scheme alleged in the complaint the said defendant, John Hanson, did adjudge the plaintiff guilty of an alleged violation of an ordinance of the city of Douglas, but the plaintiff appealed from said judgment and conviction to this Honorable Court, and on said appeal said conviction was set aside and for naught held on the ground that the evidence failed to show that any offense had been committed and the plaintiff was discharged from said prosecution with his costs.

J. H. COBB,

Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Victor Von Arx, being first duly sworn, on oath deposes and says: I am the plaintiff in the above-entitled action. I have heard read the foregoing reply and the same is true as I verily believe.

VICTOR VON ARX.

Subscribed and sworn to before me this the 15th day of July, 1915.

[Notarial Seal]

E. L. COBB,

Notary Public in and for Alaska.

My commission expires Dec. 3, 1918.

Filed in the District Court, District of Alaska, First Division. Jul. 15, 1915. J. W. Bell, Clerk.

By —————, Deputy. [11]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

CASE No. 1247-A.

VICTOR VON ARX,

Plaintiff,

vs.

W. A. SHAFER and JOHN HENSON,

Defendants.

Judgment.

This cause came on regularly for trial before the Court, and a jury of 12 qualified citizens of the Territory of Alaska on Friday the 22d day of October, 1915, at the hour of 10 o'clock in the forenoon of said day;

The plaintiff appeared in person and by his counsel, J. H. Cobb, Esq., the defendants in person and by their counsel, Messrs. Cheney & Ziegler;

Plaintiff introduced evidence in support of his complaint and rested.

Whereupon attorneys for defendants made a motion for a nonsuit upon the ground that the plaintiff had failed to make out a case against either the de-

fendant, W. A. Shafer or the defendant, John Henson.

After arguments, the Court granted the motion for nonsuit as to the defendant John Henson; to which plaintiff then and there excepted.

Whereupon the trial proceeded; the defendant, Shafer, then introduced evidence in his behalf and rested; whereupon attorneys for the defendant moved the Court to instruct the jury to return a verdict for the defendant, W. A. Shafer; after arguments, the motion for such instructed verdict was granted, and the Court instructed the jury to return a verdict for the defendant, W. A. Shafer; to which instruction and ruling the plaintiff then and there excepted. [12]

Whereupon, the jury without retiring from the box proceeded to elect R. E. Murphy, one of the jury, as its foreman, and returned and filed a verdict for the defendant, W. A. Shafer, in words and figures as follows, to wit:

*“In the District Court for the Territory of Alaska,
Division No. One, at Juneau.*

No. 1247-A.

VICTOR VON ARX,

Plaintiff,

vs.

W. A. SHAFER and JOHN HENSON,

Defendants.

Verdict.

We, the jury in the above-entitled cause, do find for the defendant, W. A. Shafer.

(Signed) R. E. MURPHY,
Foreman."

—which said verdict was received and filed in open court with the clerk of said court;

And now more than three days having elapsed since the rendition of said verdict, and the plaintiff having failed to file a motion for a new trial or a motion in arrest of judgment as provided by Statute, and the Court being fully advised in the premises,

It is ordered, adjudged and decreed that the plaintiff take nothing by this action, and that the defendants, W. A. Shafer and John Henson recover of and from the plaintiff their costs and disbursements herein expended, and taxed at the sum of \$97.50.

Done in open court this 11th day of November, A. D., 1915.

ROBERT W. JENNINGS,
Judge.

Entered Court Journal No. L, page 170,

O. K.—COBB.

Filed in the District Court, District of Alaska, First Division. Nov. 11, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [13]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 1247-A.

VICTOR VON ARX,

Plaintiff,

vs.

W. A. SHAFER and JOHN HENSON,

Defendants.

Transcript of Testimony. [14]

Testimony of Victor Van Ark, for Plaintiff.

VICTOR VAN ARX, the plaintiff herein, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Direct Examination.

(By Mr. COBB.)

Q. State your name? A. Victor Van Arx.

Q. Where do you live, Mr. Van Arx?

A. In Douglas.

Q. How long have you lived in Douglas?

A. 1902 I came up.

Q. You were living in Douglas then during the month of September, 1914? A. Yes.

Q. Do you know the defendant, W. A. Shafer?

A. Yes.

Q. What official position, if any, was he holding at that time—what was he in September, 1914—what office did he hold?

A. He was the marshal—Shafer was the city marshal.

(Testimony of Victor Van Ark.)

Q. The city marshal?

A. City marshal; yes, sir.

Q. Do you know the defendant, John Henson?

A. Yes.

Q. What was he at that time? A. City Judge.

Q. City Judge, city magistrate? A. Yes.

Q. Do you remember the occasion when Mr. Shafer came down to one of your houses there about the 11th of September? A. Yes, I know.

Q. The day you were arrested? [16]

A. Yes.

Q. Now, Mr. Van Ark, I want you to tell the jury just what happened on that occasion?

A. Well, I have then to start in with the 8th of September.

Q. The 8th?

A. Yes; the 8th of September. The 8th Hunsaker, he gives himself,—it is not true as Cheney told, that he killed his wife and another man in the house,—he killed his wife and the other man in the street, for jealousy, and he went home; so much I hear; I heard the trouble, but I don't know anything that happened; and he went home, and in the morning I heard a shot again about 2 o'clock. Well, the next day they told me that Hunsaker killed himself and killed his wife and killed the other man; Hunsaker had the key, and he shot himself in the house. It was pretty warm weather, and I waited for a while, and then I asked what happened here, and everything was pretty dirty, and dirt in every corner, and I could not let it go much longer, and

(Testimony of Victor Van Ark.)

I found they were gone and locked the place; therefore I went over to the United States Commissioner and asked him for the key; I asked him if he went in there, and he said it looked pretty bad in there and it ought to be cleaned up. The United States Commissioner told me that it was too bad that nobody cleaned it up, and it would have to be cleaned right away. I asked Marshal Shafer, or O'Connor, if he had got the key, that I don't know who has locked the door, and he said, "You go and clean it up right away; it is in the middle of the town and it is bad in that condition in warm weather." I went and asked Mr. O'Connor for the key, and asked all over, and nobody knew nothing about it. In the evening John came to [17] me and told me that the commissioner told him to tell me to go in that place and clean that up, that it cannot be left this way. I told him, "All right, I cannot get in; I cannot get in through the roof," so there was a window in the roof, and I go in that and get down to get the key for somebody to clean up. I turned the key and took it home, and I just got home when Ed Hunsaker, his brother, come to me and told me, "I would like to get in the house to save the effects that was in there, and for to take out my part." I told him, "Yes, I got some, and you got some;" most of the furniture was mine, and I said, "I go down with you and show you what is mine, and you can do what you want with his effects."

Q. That was on the 11th of September.

A. That was on the 13th, the day I got arrested—the 13th, I believe.

(Testimony of Victor Van Ark.)

Q. The day you were arrested?

A. Yes. I told this man that I eat dinner and go and get a key; Marshal Shafer go in for the effects, to look after the effects; I was in there, in the Hunsaker house. Marshal Shafer do to me all bad things during the last half dozen year, I told this man that, and I told him, "You tell Marshal Shafer if he no got paper to go in my cabin, I no let him in"—you tell him that. After while I tell Marshal Shafer, "Stay here. I suppose you got papers in the hand for right to go in; you know very well I don't allow you in my property any more—you do me so much bad things." He told me, "I will go in; what's the matter with you, you old bastard." I take the key to try the key, and it ain't the right key. Well, I ain't got the right key, so I go home and get the key, and come back; and I come in and open [18] the door and go in the kitchen, and then Hunsaker come in, and Marshal Shafer push Hunsaker aside and tried to get in first. I told him, "Go away from my property; I don't want you at all; if you haven't got a paper you go away; I know you a long time"; and he talk nice then, and said, "What is the matter with you? All the time we are good friends." We go in the kitchen, and Shafer takes both hands and pull me out on the sidewalk and out on the street, and I know I have to do something, and I hit him down.

Q. Knocked him down?

A. Yes; and I called for help and Ed. Hunsaker come up and helped him; he got me by the arm and

(Testimony of Victor Van Ark.)

the other man got me by the other arm, and just so quick as Marshal Shafer was free with his hands he jumped up and pulled a revolver, and threw the revolver on me, and pressed it on me, and told me I was under arrest, and he pushed me in the back half a dozen times; I go ahead, and he push me this way (indicating) down through the street, and we come to the bank, and I see John Henson in the door of the bank, and Marshal Shafer tell me to go over to the city jail, and I look and see John Henson here in the doorway.

Q. What bank?

A. No, not the bank, in his office, and I want to go to John Henson, and he grabbed me, and put me in jail, and I was in jail all evening, and there was another man in jail who was crazy—

Q. The other man was in the jail?

A. Yes; I didn't get locked in; they let the crazy man be with me, and do just what he wanted with me, and called me what he wanted to call me, and I was afraid of this man; they didn't lock me in, and the next day I showed Mr. Cobb and said that was the open cell they left the man in and me. [19] In the evening when I was in jail come Henson and told me—

Mr. CHENEY.—Just a moment—I object to any statement by Henson.

The COURT.—Don't state anything that somebody told you unless Mr. Shafer or Mr. Henson was there.

A. Judge, please, Mr. Henson came to me for tell-

(Testimony of Victor Van Ark.)

ing me that Fuesi came to John Henson to get bail to get me out.

Q. About what time of day was it that he put you in jail?

A. Oh, he put me in jail maybe—it cannot be after eleven or twelve; I was just eating dinner.

Q. You had not been to dinner yet? A. No.

Q. How long did he keep you in jail?

A. Oh, he keep me in jail until next day about 1 o'clock.

Q. That was after I got over there and got you out of jail? A. Yes.

Q. Do you remember the amount of bail you put up then—fifty dollars? A. Yes.

Mr. CHENEY.—I object to counsel testifying.

Q. What condition was the jail in?

A. Oh, well, the jail was a jail, and I cannot say anything only they put a crazy man in there with me.

Q. Was it clean?

Mr. CHENEY.—I object to this testimony about there being a crazy man in this jail; counsel has not plead anything of this kind, and if that is going to be used in this case in the element of damage it should be pleaded in the complaint; there was no mention made of it, and this is the first I have heard of it.

The COURT.—Gentlemen of the jury, the fact that there was a crazy man in jail has nothing to do with this case, and you will absolutely [20] disregard such testimony.

(Testimony of Victor Van Ark.)

the other man got me by the other arm, and just so quick as Marshal Shafer was free with his hands he jumped up and pulled a revolver, and threw the revolver on me, and pressed it on me, and told me I was under arrest, and he pushed me in the back half a dozen times; I go ahead, and he push me this way (indicating) down through the street, and we come to the bank, and I see John Henson in the door of the bank, and Marshal Shafer tell me to go over to the city jail, and I look and see John Henson here in the doorway.

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The COURT.—Gentlemen of the jury, the fact that there was a crazy man in jail has nothing to do with this case, and you will absolutely [20] disregard such testimony.

(Testimony of Victor Van Ark.)

Q. What condition was the jail in with reference to being clean and decent, or otherwise?

A. Oh, well, it was dirty.

Q. Now, state what food and drink was given you, if any, during the 25 hours you were in there?

A. Nothing.

Q. Did they bring you anything to eat?

A. No, they tried to kill me with hunger.

Q. Did they give you anything to drink?

A. No, nothing.

Q. State if you had anything to eat or drink until you got out the next day?

Mr. CHENEY.—I object to that for the reason that it maybe that he didn't eat or drink anything, the question is, was it furnished; if he gets food it is his business whether he wants to eat it or not.

The COURT.—If you ask a man if he had anything to eat or drink you would naturally mean was there anything there for him to eat or drink.

Mr. COBB.—I will withdraw the question.

Q. State whether or not while you were in jail there, any food or drink was furnished you.

A. No; a man can go and get a drink himself, there is water in the jail, and he can get water—that is right.

Q. There is running water in there?

A. I cannot tell exactly if it is running water; I know I drank water in there.

Q. Was there any food furnished you?

A. Food was never furnished.

Mr. COBB.—You may cross-examine. [21]

(Testimony of Victor Van Ark.)

Cross-examination.

(By Mr. CHENEY.)

Q. Mr. Van Ark, you claim you have lived in Douglas since 1902? A. Yes.

Q. Now, in regard to this house where this trouble occurred with Mr. Shafer, I will ask you who had been living in that house? A. Ed. Hunsaker.

Q. How long had he been living in it?

A. Eight years.

Q. Eight years?

A. Yes, sir; maybe two or three months more or less, just about that length of time.

Q. And he is the same man that shot and killed himself, isn't he? A. Yes.

Q. He lived in that house for eight years, and you never lived there, did you—that wasn't the place where you lived?

A. That was not my place where I lived, but I own the property.

Q. I didn't ask you that; I ask you if you had ever lived in that house for eight years?

A. Oh, I lived maybe a month or two months in there.

Q. Where were you living when this thing happened? A. Up there (indicating).

Q. Up where?

A. On the other side of the hill, about maybe 100 yards up.

Q. That is what I want to find out; at the time this trouble occurred then with Mr. Shafer you were living in another house? A. Yes.

(Testimony of Victor Van Ark.)

Q. Up towards the hospital?

A. Yes; between the hospital and the beach road.

[22]

Q. You have lived there a long time, haven't you?

A. Yes.

Q. And this place where the trouble occurred had been rented to Hunsaker for eight years?

A. Yes.

Q. So after this man killed himself you say you went over to the Commissioner to see if you could not get the key? A. Yes.

Q. So that the place could be cleaned up?

A. Yes.

Q. Now, when you went to get into that place you said you went through the roof?

A. By the ceiling was a door, window, not for to go down; that was the next day, the Commissioner let me know I was to go in and clean up.

Q. You went through the roof then? A. Yes.

Q. So you didn't have any key for that place?

A. I cannot get any key from Mike O'Connor or from the marshal.

Q. You knew, Mr. Van Arx, that the place was in the keeping of the marshal, didn't you? You knew they had locked this place up?

A. That didn't look right to me, because the Commissioner told me to go in and clean out and I cannot believe that it was in charge of somebody else, because where the man shot himself I didn't think I had to ask to go in there.

Q. You said just now that you could not get the

(Testimony of Victor Van Ark.)

key from the marshal so you went through the hole up in the roof? A. That was the only way.

Q. Now, you claim, Mr. Van Ark, that you went over there and unlocked the door, when Mr. Hunsaker went to your house and [23] got you to unlock the door, and that you went inside of the house?

A. No, first I went down and the key would not open the door, and after I went home and got the other key we went in.

Q. Now, look here—if you had to go through the roof before that to get into that house, why didn't you use the key that you opened the house with then?

A. The door was locked with a snap lock on the inside, and I cannot open it at all on the outside, and I got another key and unlocked the door; they have got a snap lock and every time you snap the door the door is locked; after I got in and took the snap off for locking the door, then the door opened.

Q. So you got the key, and then—where did you get this key that you used the day you let those fellows in the house—did you get the key in the house?

A. No; I got the key at home, and took the key and fitted the key.

Q. When did you do that?

A. Altogether three days time, about three days; when I got the order of the Commissioner, and when the marshal come to make the trouble was about two days after, and I was cleaning out this place all right.

Q. What I am trying to find out, and what I want you to tell the jury is where you got that key—did you go through the roof and take the key from the

(Testimony of Victor Van Ark.)

inside of the house, of that lock, or did you make the key?

A. I didn't make the key, I bought it.

Q. After you went in through the roof that day, you bought a key, and so you had a key the day they came there? A. Yes. [24]

Q. Now, when Mr. Hunsaker came down to your house there, you were going to eat dinner, and he told you he had brought the marshal down to go into that house, didn't he?

A. Well, he told me that the marshal was going down with him.

Q. And you said that is all right, didn't you?

A. No; I told him never mind the marshal, because for six years he had been doing me all the dirty tricks he could do, and the marshal didn't get in my property if he didn't have the papers with him.

Q. I thought you stated that Hunsaker told you that he had brought the marshal down and you said all right? A. No, sir; I never told that.

Q. Well, then, I misunderstood you. Now, you claim that you went into the house and went into the kitchen with Hunsaker and Shafer.

A. No; I never claimed that.

Q. Did you say a moment ago when Mr. Cobb was asking you questions that you went in the kitchen, and after you had been in there a while that Mr. Shafer turned you out in the street?

A. I never told that.

Q. Were you inside of the house at all the day this trouble happened?

(Testimony of Victor Van Ark.)

A. You see I went back and opened the door and told Hunsaker, "Now, you come in," and I was in there in the kitchen.

Q. You were in the kitchen?

A. Yes, and I called Hunsaker to come, but Marshal Shafer pushed Hunsaker aside and tried to come first; that was the way, and when he come on my sidewalk I say, "You get out of here; you have got no business here."

Q. Now, this is what I want to get out—you were in the kitchen and Hunsaker was in the kitchen?

[25]

A. Hunsaker was in the doorway.

Q. You were in the kitchen?

A. I was there, yes.

Q. Then, when Mr. Shafer tried to get in, you were not in the doorway?

A. No, sir; I was in the door.

Q. Did Shafer get inside of the house?

A. Shafer come up on my sidewalk and pulled me out.

Q. Did he go inside of the house?

A. Inside of the house, sure; just in the corner of the door; he cannot come in because I was in the doorway.

Q. Shafer didn't go into the house.

A. No; that was my property.

Q. You were standing on the door-steps?

A. I was standing inside in the kitchen, and he come on my sidewalk and pulled me out.

Q. Now, you knocked Shafer down, didn't you?

(Testimony of Victor Van Ark.)

A. Was nothing else to do, if a man come and pull me out on the street and hit me.

Q. Did you knock Shafer down?

A. He knocked me first.

Q. He knocked you down?

A. No, because he cannot knock me down.

Q. Did you knock Shafer down in front of the door in the street? A. He fell down.

Q. And you were on top of him and some man pulled you off? A. He called for help.

Q. He called for help and Hunsaker and some other man pulled you off? A. Yes.

Q. Quite a number of people around there?

A. Yes. [26]

Q. Then as soon as they pulled you off Mr. Shafer jumped up and arrested you, didn't he?

A. Just so quick as he get up I cannot do anything more, and Shafer pulled out a revolver and put the revolver on my breast.

Q. You claim he pointed the gun at you?

A. Yes.

Q. And he arrested you and took you up to jail?

A. Yes.

Q. Now, you say that for eight years Mr. Shafer had been doing a great deal to you—what had he done to you—arrested you?

A. No, but he do me all tricks that he can do; one time we was up in court and there was a letter—I believe Mr. Cobb got the letter—making complaints, and it says I got three cabins that are pretty dirty—I cannot keep them clean because there is a man in

(Testimony of Victor Van Ark.)

there with lots of children and makes dirt—and they told me this must be cleaned—that it cannot go this way any more and it have to be cleaned; he asked me whose cabins they were, and I told him they belonged to Mike O'Connor. All right, the next day I cleaned the place; I have got no spectacles, and without spectacles I cannot see to read, and two times I go to Cheney about the trouble and he said they cannot hurt you. I cleaned the place up, and as I finished it was pretty warm weather, and I went down to Mike O'Connor's cabin, and he told me if I didn't see a paper, that he sent me a paper, and he would fine me \$100.

Q. Now, at that time Mr. Shafer was enforcing the orders of the health committee on the city council, and ordered you to clean up your dirty places?

A. No; they didn't make complaints—that is not true. [27]

Q. Complaints were made and then they told you to go and clean them up, and you did clean them up?

A. No; I told you the people go in there, and some people have got no right to say anything, and Marshal Shafer and Henson make out the paper and handed me the paper, but I got no spectacles and I cannot read.

Q. Those were your cabins—those dirty cabins?

A. No; they were not mine; they were O'Connor's.

Q. You claim they made you clean up somebody else's property?

A. Yes; I had to clean up for these people what was in O'Connor's cabins; another thing, in the win-

(Testimony of Victor Van Ark.)

ter time when the cold weather is, Marshal Shafer comes around on that man that was living in my cabin, and that man said, "What are you turning that way"—

The COURT.—Never mind, Mr. Van Arx.

Q. Ever since you have lived in Douglas you have had trouble with the city and the city authorities, haven't you, and you have been arrested and convicted on several occasions, haven't you?

A. I never had trouble with the city; the marshal he got trouble with me.

Q. As a matter of fact, haven't you been convicted of using dangerous weapons, or assault with a dangerous weapon in Douglas, before John Henson?

Mr. COBB.—I shall object to that as irrelevant and immaterial.

The COURT.—They may ask if he has been convicted of a crime.

Mr. COBB.—Not a mere misdemeanor.

The COURT.—Any crime.

Mr. COBB.—All right.

Q. You were arrested and convicted for assault with a dangerous [28] weapon, weren't you? Just answer the question, and you can explain it later to Mr. Cobb; you were convicted in the municipal court in Douglas for assault with a revolver, with a dangerous weapon?

A. I was convicted, and you promised me for twenty dollars to defend me, but I know I have to come to Juneau a half a dozen times, and Mr. Cobb—

Q. You can explain that, Mr. Van Arx, if you want

(Testimony of Victor Van Ark.)

to to Mr. Cobb. Now, the time you were convicted for assault with a dangerous weapon, Mr. Shafer was in Douglas at that time and was city marshal, wasn't he? A. Yes.

Q. Mr. Henson was the Judge? A. Yes.

Q. Now, in addition to that you had trouble with the mayor of the city, and with all of the city council?

A. I never talked with the mayor.

Q. When O'Connor was mayor, didn't you have trouble with him about your property down on the beach?

A. He was down on the beach, and I asked him, I said, "Are you going to take my water away from here? I got a right to use the water in the toilet, and you got no right to go and take the water away." I believe that is right.

Q. Now, Mr. Van Arx, at the time you were arrested there, the time you knocked the marshal down, just before you knocked him down didn't you use vile and obscene language, or words to this effect—

Mr. COBB.—I object to that as not cross-examination, and part of their defense.

The COURT.—Objection overruled, because this is part of the things that you brought out.

Q. I used rough language like he did; I did it too.

[29]

Q. Isn't it a fact that you called Marshal Shafer a God damned son-of-a-bitch?

A. Well, I called him just what he called me back; I called him back what he called me; yes, sir.

(Testimony of Victor Van Ark.)

Q. You did call him that, didn't you?

A. I cannot tell you now, 14 months, exactly what I did call him, but I called him the names he called me; I called him the names he called me, yes.

Q. You told Mr. Shafer also to go down and take care of his sporting women, didn't you, of his whores?

A. I told him, "You go down to the sporting girls, that is all the work what you do; you don't do any work for the city, only the sporting girls."

Q. Now, immediately after you used that language Mr. Shafer arrested you, didn't he—right after that Mr. Shafer arrested you and took you to jail?

A. Mr. Shafer don't arrest me—he pulled me out of the door, and these people keep me back; he arrested me afterwards.

Q. You claim that he rushed in and went into the house and pulled you out of your house?

A. He pulled me out.

Q. Pulled you out of this house?

A. Yes; he say pretty things—"We were all the time good friends, and what is the matter with you," and just as soon as he got near he pulled me out.

Q. Mr. Van Arx, when you were put in jail there, as a matter of fact you were locked up the same as any other person and put into a separate cell by yourself at night, weren't you?

A. I wasn't locked up.

Q. You were put in a cell there where there was a bed, and you had a bunk or bed? [30]

A. Yes; that is right.

(Testimony of Victor Van Ark.)

Q. And Mr. Shafer brought you some food, didn't he? A. No; he didn't bring me nothing.

Q. There was a pipe in the corridor of that jail, a water-pipe with running water right there in the corridor that you could help yourself to, wasn't there? A. The water was in there.

Q. There was running water in there, and you drank water, didn't you?

A. Yes, that is right; I drank water.

Q. Did you ask Mr. Shafer to bring you anything to eat?

A. No; I didn't ask him; he come in the evening and brought a bucket full of eats and give to the crazy man, and give him feeds, and he told him, "I got your feed."

Q. He brought in food for the other man and didn't bring you anything?

A. Didn't give me nothing; didn't give me anything.

Q. You didn't ask for anything?

A. Oh, no; oh, no.

Q. You claim it was 1 o'clock the next day before he took you into court? A. I cannot tell exactly.

Q. Tell the jury when it was as near as you can?

A. As near as I can tell, he took me there at 10 o'clock in the court.

Q. Why did you say a few moments ago, then, they kept you in that jail until 1 o'clock the next day?

A. He put me back, because I go over there to Mr. Henson, and Mr. Cobb wasn't there, and I said Mr. Cobb will come over on the 11 o'clock boat, and they

(Testimony of Victor Van Ark.)

put me in jail again, and at [31] 1 o'clock Mr. Cobb was there, and I don't know exactly when Mr. Cobb came over there, and Marshal Shafer and I go out after this time.

Q. Then, Mr. Van Arx, it is a fact that you were put in jail sometime in the afternoon one day, and that you were kept there that night, and that you were taken into court the next morning at 10 o'clock, before Mr. Henson?

A. They brought me over there.

Q. You said, didn't you, that they brought you over there before me Mr. Henson? A. Yes.

Q. And you asked that the case be put off because you wanted to get a lawyer from Juneau?

A. Oh, he come all right.

Q. Mr. Cobb wasn't there, was he?

A. He was over there.

Q. He wasn't there, was he, at 10 o'clock?

A. No.

Q. Now, isn't it a fact that you asked for your case to be put off until your lawyer could come from Juneau, and then Mr. Henson put you back in jail, or Mr. Shafer did? A. Yes.

Q. When you got through with that fight with Shafer, Shafer looked pretty bad, didn't he—his clothes were all dirty, and he was scratched up somewhat, wasn't he? A. He never looked good to me.

Q. So you don't now, Mr. Van Arx, make any complaint particularly about the jail being dirty—what you claim now is there was another man in there that had fits, as I understand? A. Yes. [32]

(Testimony of Victor Van Ark.)

Q. This man didn't hurt you any, did he?

A. He didn't hurt me, but I think it was a careless thing for the city marshal and the city court that the man didn't get locked up when he is crazy.

Q. That is just your opinion about his condition, whether this man was crazy or not?

A. Well, I believe he was.

Q. That was your opinion? A. Yes.

Q. Now, Mr. Van Ark, I will ask you if you, at any time after you were arrested in the afternoon, offered to give bail?

A. No, put me in jail and don't look at me and don't bring me nothing to eat, how would I get a chance to get bail or pay anything?

Q. When Mr. Shafer came to the jail any time there in the afternoon with the food, did you ask him then to give bail, or did you ask him for a chance to get bail?

A. It was 5 o'clock before Shafer was here, and Henson was pretty glad knowing that they have got me in there, and said now we have got the bird there he don't get any bail, I know that.

Q. How do you know that?

A. Because when a man here asks for bail for me they don't let him have any.

Q. So that is the reason why you say now that you know that Mr. Henson and Mr. Shafer said, "Now, we have got the bird, we are going to keep him in there"? A. Yes, sir.

Q. Did you ask Mr. Shafer to get bail, or did you offer to give any bail that afternoon?

(Testimony of Victor Van Ark.)

A. He don't talk to me, and I haven't got nothing to do with him, but I asked him to bring me into court, and he didn't talk. [33]

Q. When did you ask him that?

A. Just when he put me in jail; I says, "Here is Mr. Henson in the doorway," and he took the club out, and he said come on to jail, and right away he put me in jail.

Q. What did you say to Mr. Shafer about that, about taking you into court—did you ask him to take you particularly to Henson's court? A. Yes.

Q. Where did you ask him that?

A. As he go with me right along.

Q. On the street?

A. Yes; the jail is before Henson's building, and Henson was in the doorway.

Q. The jail is down between the sawmill and Henson's office, isn't it? A. Yes.

Q. On the beach? A. Yes.

Q. And in going from the beach down below the sawmill and going up town, you come to the jail first, before you come to Henson's office? A. Yes.

Q. Henson's office is up in the block across from the postoffice? A. Yes, maybe 50 yards away.

Q. Now, then, Mr. Hunsaker had lived there in that house for eight years before he killed himself—had he come to you and given the place up, or said anything to you about he was going to kill himself?

A. No; he didn't say nothing.

Q. He rented the house there and lived in it for eight years?

(Testimony of Victor Van Ark.)

A. Yes, and he was owing about three months' rent.

Q. You understood at that time, Mr. Van Ark, that Mr. Ed Hunsaker— [34] that is, the brother that was over there to see you—you understood he was the administrator of his brother's estate, didn't you?

A. I couldn't say, no; the commissioner don't tell me nothing.

Q. Mr. Hunsaker told you he had charge of his brother's estate, didn't he? A. No, sir.

Q. And he had brought the marshal down to get the stuff? A. No, sir.

Q. What did he tell you when he came over to your house that day?

A. He come and told me the marshal was here for sizing up the effects.

Q. He told you the marshal was there to size up the effects? A. Yes.

Q. And didn't he say that he was administrator of his brother's estate and he wanted to get into the house for that purpose?

A. No, he don't tell me nothing.

Q. Where is Mr. Hunsaker now?

A. Up in Auk Bay, I heard; I heard somebody was gone for him; I don't know.

Q. Out at Auk Bay? A. Yes.

Q. So you claim, Mr. Van Ark, that when you struck Mr. Shafer he was standing just outside of the door and you were in the house—is that right—where were you when you struck Shafer, weren't you on the street?

(Testimony of Victor Van Ark.)

A. He pulled me out on the street, yes; he pulled me out of the kitchen out on the street.

Q. When you say the kitchen do you mean the first room in the house? [35] A. Yes; the first room.

Q. You say there was quite a crowd of people there when that happened? A. There was.

Q. When you appeared in court the next morning, Judge Henson was there, wasn't he? A. Yes.

Q. And you were brought in there, and isn't it a fact that he was going to go ahead with your case, and that you said you wanted a continuance, that you wanted your case put off—isn't that true?

A. He brought me over there after 10 o'clock, and I don't want to go ahead, and I told him on the 11 o'clock boat comes Mr. Cobb, and I don't want my case to come up until he come. Well, all right, he said, at 1 o'clock, and he put me back in the jail, the marshal put me back.

Mr. CHENEY.—That is all.

Redirect Examination.

(By Mr. COBB.)

Q. When was it the complaint was made against you for assault with a deadly weapon?

A. It is about three or four years ago, I cannot tell; it was a long time ago.

Q. And you say Mr. Cheney defended you on that occasion?

A. I explained to Mr. Cheney—you weren't home—I explained to Mr. Cheney, and Mr. Cheney said they cannot hurt you, if a man stay in your door and want to lick you; I told him to go away three

(Testimony of Victor Van Ark.)

times, and he didn't go, and I took the revolver and told him you got to go.

Q. You were convicted for that before Mr. Henson?

A. Yes; you were not here, and I went to Cheney and I know when [36] a man has a little business in Juneau he has to spend two or three days in Juneau, and Cheney tell me I better pay the \$20, and let it go.

Q. That is, you say, four years ago, and you paid the \$20 fine? A. Yes.

Q. Is that the only time Mr. Henson ever had you brought before him over there?

A. Never nothing else at all.

Q. You were never brought before him at any other time? A. Nothing else at all.

Mr. COBB.—That is all.

Recross-examination.

(By Mr. CHENEY.)

Q. I didn't appear for you in that case, Mr. Van Ark—you say I told you it was cheaper to pay the fine rather than hire a lawyer in Juneau to go over there, and you paid your fine, isn't that right?

A. Yes, that is right.

Q. I didn't go over to Douglas and defend you, did I? A. No.

Q. I told you it was cheaper to go over there and pay your fine?

A. No, you didn't tell me that; I would take this paper and go to Mr. Cobb if he was at home.

Q. What do you mean then that I told you?

(Testimony of Victor Van Ark.)

A. I don't understand; the only thing, it could be made to see if you are in your house in there and a man come to the door and tried to lick you, you have got a right to take a revolver and tell him you have got to go, and I have got a witness here and I can bring the witness.

Q. That is all right, I didn't remember it—when you came to [37] see me you came to my office in Juneau? A. Yes.

Q. And you told me about the case?

A. About how it happened.

Q. You didn't hire me to go over there, and I didn't go over there? A. No; you didn't.

Mr. CHENEY.—That's all.

(Witness excused.)

(Whereupon court adjourned until 1:30 o'clock P. M.) [38]

AFTERNOON SESSION—October 23, 1915,
1:30 P. M.

Testimony of Jas. L. Manning, for Plaintiff.

JAS. L. MANNING, a witness introduced on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Direct Examination.

(By Mr. COBB.)

Q. State your name. A. James L. Manning.

Q. What is your occupation?

A. United States Deputy Marshal.

Q. As such a United States Deputy Marshal was

(Testimony of Jas. L. Manning.)

a subpoena placed in your hands for Mr. Hunsaker?

A. Yes, sir.

Q. Did you make every effort to find him?

A. Yes, sir; I did.

Q. Could you find him?

A. I could not find him, no.

Q. Just state what efforts you made?

A. In detail?

Q. In a general way.

A. I inquired around town for this gentleman, and I was told by Charles Rudy out at Mendenhal that he thought he was out at Auk Bay somewhere on the beach; I came back and told Mr. Cobb, and Mr. Cobb told me I would have to go out, and I made arrangements with George Nelson to take me out on his motor cycle, and we went out as far as we could, out beyond Knudson's; we got out there about 4 o'clock in the afternoon, and I took the trail through the woods and went around Auk [39] Bay, and I think I covered the beach in the vicinity of Auk Bay about 7 miles; I was out there from about 5 o'clock in the evening until 11 o'clock at night, and George Nelson and I fired a number of shots from revolvers, and hollered, and we visited every cabin along the beach, and we couldn't find anyone home anywhere.

Mr. CHENEY.—I don't know the purpose of this.

Q. You made every reasonable effort?

A. I made every effort, yes.

Mr. CHENEY.—What is the purpose of this?

Mr. COBB.—It is simply an answer to your question here to the plaintiff, where Mr. Hunsaker is.

(Witness excused.) [40]

Testimony of John Fuesi, for Plaintiff.

JOHN FUESI, a witness introduced in behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Direct Examination.

(By Mr. COBB.)

Q. State your name? A. John Fuesi.

Q. Where do you live? A. In Douglas.

Q. How long have you lived there?

A. Seventeen years, a little over.

Q. What is your business? A. Hardware.

Q. You ran a mercantile establishment over there?

A. Yes, sir.

Q. Do you know the plaintiff, Victor Van Arx?

A. Yes, sir.

Q. Do you know the defendant, John Henson and W. A. Shafer? A. Yes, sir.

Q. Do you remember the occasion of the arrest of Victor Van Arx by Mr. Shafer in September, 1914?

A. Yes, sir.

Q. Mr. Fuesi state to the jury about how long after the arrest before you heard of it.

A. Two or three hours afterwards.

Q. You don't know just how long it was?

A. No, I couldn't state exactly the hour.

Q. The same day?

A. The same afternoon; Theodore Hunsaker came into my place and said— [41]

Mr. CHENEY.—I object to that.

Q. Never mind what Mr. Hunsaker said. What,

(Testimony of John Fuesi.)

if anything, did you do then in regard to it?

A. I told Theodore to go and tell Mr. Henson—

Mr. CHENEY.—I object to the conversation between him and Mr. Henson.

The COURT.—Don't tell anything about what was said.

Q. State what you did.

A. I told him I would like to get a bond for him to get him out and told him—

Mr. CHENEY.—I object to the conversation between him and Henson.

The COURT.—That may be stricken. You were asked what you did, not what you said—what did you do?

A. Well, what I did, Theodore came back again and said, "I couldn't get no answer"; I said, "All right." He said, "Mr. Henson is on the outside there," and I went outside there and said, "Why, Mr. Henson, Theodore and I will go good for this man."

Q. Is that the city magistrate, Mr. Henson?

A. Yes, sir.

Q. What did you say to Mr. Henson when you went to him?

Mr. CHENEY.—I want counsel to state first the time and place that this occurred so we are to know what we are to meet.

The COURT.—Very well, you may cross-examine him on that.

Q. What did you say to Mr. Henson when you went to him with Hunsaker?

(Testimony of John Fuesi.)

A. I says: "I like"—

The COURT.—Fix the time and place, Mr. Cobb.

Q. When was it that you went to see Mr. Henson?

A. It was in the afternoon.

Q. Of the day of the arrest?

A. Yes, sir. [42]

Q. Can you fix the exact hour?

A. No, sir; I cannot.

Q. You went to him as soon as you heard it?

A. Yes, sir.

Mr. CHENEY.—I object to that; that is counsel's own conclusion.

The COURT.—Yes, don't lead the witness.

Q. When you went to see him where did you find Mr. Henson?

A. In front of the jewelry store of Al Bloedhorn.

Q. In Douglas City, Alaska? A. Yes, sir.

Q. Now, what occurred when you got there—just state as near as you can recall everything that was said?

A. I said, "Theodore and I, we go good for this Van Arx, let him out, let him go home"; and he said, "Nothing doing until to-morrow at 10 o'clock." That was all that was said, and I went back to the shop and went to work again.

Q. State to the jury whether or not you and Mr. Theodore Hunsaker were prepared to furnish any reasonable amount of bail that might be required?

Mr. CHENEY.—I object to that because the witness didn't state what he said—that is, he said, "We go good for this Van Arx"; now, that is all the wit-

(Testimony of John Fuesi.)

ness claims, and whether or not they had a certain amount of real estate, or whether they had personal property, or whether they did not; whether they could justify on a bond for any amount, it seems to me as immaterial; that is a question that has to be decided in court when the bond is taken. I suppose his only object is to show that somebody offered to go this man's bail, and when he has reached that point it seems to me that going into the question of how much money Mr. Fuesi has is immaterial, especially in view of the fact that Mr. Henson did not say [43] that he would not release Mr. Van Arx because they were not sufficient for bail.

Q. You can answer the question, whether you were prepared to go to give any reasonable amount of bail? A. Yes, sir.

Q. Where is Mr. Theodore Hunsaker?

A. He is dead.

Q. He has died since then? A. Yes.

Q. Was Mr. Hunsaker a man of property over there? A. Yes.

Q. And so are you? A. Yes, sir.

Mr. COBB.—You may cross-examine.

Cross-examination.

(By Mr. CHENEY.)

Q. What Hunsaker are you talking about?

A. Theodore Hunsaker, the man who died here a few months ago.

Q. The brother of the man who shot himself?

A. Oh, no; no.

Q. The other Theodore Hunsaker, the little, short

(Testimony of John Fuesi.)

fellow? A. Yes, the little, short fellow.

Q. Now, state again, Mr. Fuesi, just what you said to Mr. Henson? Just state the words you used to Mr. Henson?

A. Well, I said to Mr. Henson to let Victor out and let him go home, and that we would go good for him, the same as we go bail for him.

Q. You would go good for him? A. Yes.

Q. That is all you said? A. Yes. [44]

Q. And he said nothing doing? A. Yes.

Q. And you went back to the store again?

A. I went back to work again.

Q. Do you say Theodore was there with you and Mr. Henson at the time? A. Yes, sir.

Q. On the sidewalk? A. Yes, sir.

Q. That was not in Mr. Henson's office in the courthouse? A. No.

Q. You didn't go up there?

A. No, just in front of the jewelry store of Al Bloedhorn.

Q. Right on the street? A. Yes.

Q. What other conversation did you have with Mr. Henson?

A. I didn't have no other conversation.

Q. Didn't you abuse Mr. Henson at this time and tell him that he had no right to arrest this man, and no right to put him in jail, or words to that effect?

A. Not to my recollection.

Q. As a matter of fact Mr. Fuesi, isn't this true, that you met Mr. Henson when he was going from the restaurant after having his dinner, you met him

(Testimony of John Fuesi.)

on the street and you said to Mr. Henson: "You got no right to arrest Van Arx, you got no right to put him in jail?"

A. I don't remember of anything I said like that.

Q. You simply said what you claim now that you said, that you would go good for Van Arx?

A. Yes, sir.

Q. And Mr. Henson and you have not been very friendly for a [45] number of years, have you?

A. I don't know; we talked together the same as anybody else doing business together.

Q. You haven't had any unfriendly feeling toward him and Mr. Shafer? A. Not to my knowledge.

Q. You and Van Arx are pretty good friends, aren't you? A. Yes, sir.

Q. Both Swiss nationality? A. Yes, sir.

Q. Talk the same language? A. Yes, sir.

Mr. CHENEY.—That is all.

Mr. CHENEY.—Just another question: You didn't state the time this conversation occurred, did you?

A. No, I cannot state the time, it was in the afternoon.

Q. Sometime in the afternoon? A. Yes, sir.

Q. Would you say about 5 o'clock?

A. Somewheres around there, I suppose.

Mr. CHENEY.—That is all.

Redirect Examination.

(By Mr. COBB.)

Q. You went as soon as you heard of the arrest,

(Testimony of John Fuesi.)

did you—you went to Mr. Henson as soon as you heard of the arrest?

A. I went to Mr. Henson; when Theodore could not get no answer from him, I went to him.

Mr. CHENEY.—He insists on getting that in, your Honor; you have ruled it out once.

The COURT.—Yes; that will be stricken, Gentlemen of the Jury. [46]

Q. Did you go to see Mr. Henson as soon as you heard of the arrest?

A. I think it was at that time.

The COURT.—About 5 o'clock, you say?

A. Somewheres around there.

Mr. COBB.—That's all.

(Witness excused.)

PLAINTIFF RESTS. [47]

Mr. CHENEY.—If the Court, please at this time I move for a nonsuit on the ground that plaintiff has failed to substantiate the allegations in the complaint. This suit is based upon a conspiracy between Henson and Shafer, and states that they conspired together to commit these unlawful acts, and that they put this man in jail without food or water, and that the jail was dirty, and they allege all these various things as a basis for an action of damages. Their own evidence does not show—and Mr. Van Arx himself does not swear that the jail was dirty, and there is no evidence at all of any conspiracy. Certainly so far as Judge Henson is concerned the plaintiff has failed to make out a case. It seems to me at this time if there is any case at all, it could only be

against Mr. Shaefer, because Mr. Henson is not connected in any way with this arrest, not connected with the jail in question nor with the parties, and there has been no conspiracy shown between him and Shafer.

The COURT.—What have you to say to that, Mr. Cobb?

Mr. COBB. —I have to say: Here is a man arrested between 11 and 12 o'clock without a warrant—

The COURT.—Address yourself to the case against Mr. Henson—what is there to hold Mr. Henson?

(Argument by Mr. Cobb.)

The COURT.—The case so far as Mr. Henson is concerned will be dismissed.

Mr. COBB.—To which we except.

The COURT.—The motion for a nonsuit as to Mr. Shafer will be denied. [48]

DEFENSE.

Testimony of William Fells, for Defendant.

WILLIAM FELLS, a witness introduced on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Direct Examination.

(By Mr. CHENEY.)

Q. Mr. Fells, what position, if any, did you hold in September, 1914?

A. Deputy United States Marshal in Douglas.

Q. Are you acquainted with the premises Mr. Hunsaker occupied before he killed himself last fall, in

(Testimony of William Fells.)

September? A. I am.

Q. Do you know the place where he lived?

A. I do.

Q. Were you present at a coroner's inquest upon the body of this man Hunsaker—I don't know his first name—do you know his first name? A. Ed.

Q. Ed. Hunsaker—at this place about the 8th of September, 1914? A. I was.

Q. What, if anything did you have to do with those premises, with reference to whether or not you were put in charge of them?

A. I was; I had the bodies moved, and I locked the place up by order of the Commissioner.

Q. Did the Commissioner hold an inquest over at the house? A. In the house.

Q. Were you present? A. I was.

Q. Was Mr. Shafer, the defendant in this case, present, A. He was. [49]

Q. Now, state whether or not you took any action in regard to turning these premises over to Mr. Shafer afterwards, Mr. Fells?

A. This inquest was held at 2 in the morning, or 1:20, or something like that, and the Commissioner ordered me to have the body removed to the morgue and lock the place up. The door has a storm door on it, and the only way I could find to lock up that storm door was with a padlock; I couldn't find any key, so I snapped on the lock and let it go at that, and I said if we have to get in here we can unscrew the hasp. The next morning I met Mr. Shafer and told him that if Hunsaker was up to go down there and

(Testimony of William Fells.)

open that door for him, that I had to come over here to attend court.

Q. Who was the Hunsaker you mentioned when you said that to him?

A. Theodore; I think the one with the blind eye—I don't know what his name is—Theodore, I think?

Q. That is the brother of the dead man?

A. The brother of the dead man.

Q. You told Shafer if he showed up—

Mr. COBB.—I object to him leading the witness.

The COURT.—Change the form.

Q. Just state again what you said?

A. I told Mr. Shafer to go down with Mr. Hunsaker and get in the house.

Q. What was the reason for that, if you were in Douglas?

Mr. COBB.—We object to that as immaterial, what his reasons were.

The COURT.—The object of it is simply that Mr. Shafer was not a trespasser on the property—objection overruled.

Q. What were you doing at that time—what reason did you have?

A. Why, I was attending the court. [50]

Q. You were attending court here in Juneau?

A. I was.

Q. Obligated to be here every day?

A. Every day.

Q. Mr. Fells, you were in the house at the time of the inquest? A. I was.

Q. Were any effects in the house—any personal

(Testimony of William Fells.)

property of any kind that Mr. Hunsaker left there?

A. Yes, everything seemed to be standing around there—sewing machine, mirrors, beds, table and everything else.

Q. Did Mr. Van Arx ever go to you and ask you for the key to that place? A. He did not.

Mr. CHENEY.—That is all.

Cross-examination.

(By Mr. COBB.)

Q. What did you do with the key?

A. There was no key; I never had a key.

Q. Never had a key at all—all you said to Mr. Shafer was to take that hasp off and let him in if he wanted to get in? A. That is all.

Q. And that is all the turning over that you did?

A. That is all.

Mr. COBB.—That's all.

Mr. CHENEY.—That's all.

(Witness excused.) [51]

Testimony of W. A. Shafer, for Defendant.

W. A. Shafer, the defendant, introduced as a witness in his own behalf, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Direct Examination.

(By Mr. CHENEY.)

Q. State your name.

A. W. A. Shafer.

Q. Do you reside in Douglas? A. Yes, sir.

Q. How long have you lived in Douglas, Mr.

(Testimony of W. A. Shafer.)

Shafer? A. Since '98, off and on.

Q. What position, if any, did you occupy in September, 1914? A. I was city marshal.

Q. How long have you been city marshal over there, about? A. Since 1910.

Q. Are you still the city marshal? A. Yes, sir.

Q. Do you know Mr. Van Arx? A. I do.

Q. You have heard Mr. Van Arx's testimony here this forenoon? A. I did; yes, sir.

Q. Now, Mr. Shafer, I will ask you to state what you did in regard to arresting Mr. Van Arx, on, I think it was the 12th day of September, 1914.

A. The 11th of September.

Q. State first what, if anything, you had to do with the place or premises there—who lived there, and then what occurred afterwards, leading up to this affair?

A. Well, this place, Ed. Hunsaker lived there, and he committed suicide there, and I was there with the United States Marshal; [52] I was ordered to go down there with them, as they went to arrest the man. The door was open—

Q. Just explain to the jury about that—you were ordered to arrest the man—was that before he died, suicided? A. Yes, sir.

Q. What had he done?

A. He had killed a man and a woman.

Mr. COBB.—I object to that as incompetent, irrelevant and immaterial.

The COURT.—It is immaterial except that it is preliminary, just simply to show what the man was doing there.

(Testimony of W. A. Shafer.)

Q. In the first place, where did this man that killed himself live?

A. He lived on the beach, next to Michael George's store, next door.

Q. On that street running from Douglas to Treadwell on the beach? A. Yes.

Q. Just state how this house is situated with reference to this street—whether or not there was any sidewalk in front of it.

A. Yes, sir; in going south it was on the left-hand side of the street, and there is a 6-foot sidewalk running past the house.

Q. That is the street, isn't it?

A. Yes; that is the street; that is all the street there is.

Q. I am asking you now if there is any such sidewalk in front of the house?

A. Yes, there was; there was a small sidewalk clear to the house.

Q. Did or did not the house stand flush with the street?

A. As near as any of the rest of the houses; they all come out [53] on this one street right down there.

Q. Now, you may state what occurred there—what Mr. Hunsaker had done, and what you did, briefly?

A. After the United States Marshal and I stepped into the house, Mr. Hunsaker fired a shot, and as we jumped into the back room we saw him lying on the floor, and I said to Billy Fells, "He has shot himself." We called the jury and the Coroner back—

(Testimony of W. A. Shafer.)

self." We called the jury and the Coroner back—we had examined those other cases, and we called them back, and I was the only witness examined on that case.

Q. What other cases do you mean?

Mr. COBB.—I think that is all incompetent, irrelevant and immaterial—that is what occurred on the 8th of September.

The COURT.—I don't think, Mr. Cheney, it need be gone into in detail.

Q. Now, after this coroner's inquest—you were present at the coroner's inquest, you say?

A. Yes; I was the only witness examined.

Q. What happened, if anything, between you and the marshal and the coroner, after the inquest?

A. Mr. Fells locked the house afterwards he told me to go and unlock it for the administrator of Hunsacker's estate, that was Ed Hunsaker's brother—he told me to go and unlock it for him.

Q. Was there anything in there belonging to the man who killed himself?

A. Yes; he left letters and certain articles showing what belonged to him and it seemed like Mr. Van Arx had some things in there as well as Hunsaker; I won't say what day it was, but it was after this happened, Hunsaker he spoke to me and he said he would like to get the key to unlock that house, and I says to him— [54]

Mr. COBB.—I object to that, what he said.

The COURT.—He says that Hunsaker and he went down there to look after the effects of the dead

(Testimony of W. A. Shafer.)

man, or take charge of them; that is the only material part of the case; the only material thing to you is to show that he was lawfully there.

Q. Well, Mr. Shafer, who called you to go down there?

A. Mr. Hunsaker called me from O'Connor's store.

Q. By 'phone? A. Yes, sir.

Q. Where were you at the time?

A. I was at home at dinner.

Q. Had you had your dinner?

A. No, sir; I went home to dinner after 12 o'clock, and he called me up; I says, "Where are you now?" He says, "I am in O'Connor's store;" and he asked me when I was going to come down, and I said, "Right away;" I went down to Mr. O'Connor's store and met him there, and we walked to the beach together; when we got down to the house he said, "I would like to have Jim Mitchell and Van Arx there," and I didn't object, and I waited there for 10 or 15 minutes until he came back, and he said he couldn't find Jim Mitchell, and that Van Arx was eating dinner and that we would have to wait about 10 minutes. We waited there and Van Arx came down and he started to unlock the shed door—not the one that was locked by the marshal, but the back door—and it seemed as though he didn't have keys that would unlock it and he started home, and when he started he said to me, "You needn't to stay around here, you can't get in"—I hate to repeat the dirty words he said before the lady, but I have to.

(Testimony of W. A. Shafer.)

The COURT.—Who are you talking about now?
[55]

A. Van Arx. Van Arx said, "You old whore-master, you go down to the other end of the town where you belong and attend to the whores"; those are the words he used. He went to his house to get the key and came back and unlocked the door; I walked up close to him just before he went in, and he said, "You cannot come in here," and I says, "What is the matter?" He said, "What is the matter? Any son-of-a-bitch of a thing that O'Connor wants done you are son-of-a-bitch enough to do it"; and we had a mix-up and I went on the under side.

Q. What do you mean by that?

A. He assaulted me; I grabbed hold of him with the intent to arrest him, and we were pretty busy, and finally we went down, he on top, and Hunsaker and Frank Dean pulled him off.

Q. Was there anybody around there?

A. Yes, sir; lots of people around.

Q. Where did this occur?

A. Right in front of the house, right on the sidewalk. And I says to him when I got up, I said, "Old man, you can go along with me." He says, "I don't have to"; and I says, "You old reprobate, you are under arrest, do you understand that?" I pulled my gun, not pointing it at him at all, and I put my hand with the gun down like this (indicating), but I pulled the gun to enforce my words; I had to shove him about 10 or 12 feet before he would walk, and I put my gun in my pocket and

(Testimony of W. A. Shafer.)

pulled my club and carried it in my hand all the way to the jail, and I arrested him. That was pretty close to 1 o'clock. Of course, I was pretty dirty; my clothes were dirty—I had been on my back and the street was wet and they were dirty, and I went home and changed my clothes and took them to the cleaner. [56]

Q. What part of town do you live in?

A. I live on Third street, out towards the cemetery.

Q. In the north part of Douglas?

A. In the north part of town.

Q. And you went out home to your dinner?

A. I did; I took those clothes to the cleaners, and afterwards I was looking after witnesses up to close to 4 o'clock, and I went to Mr. Henson to make out the complaint and he wasn't in the office at the time; I believe Mr. Henson was sick or something of the kind, but he was not in.

Q. Well, then, Mr. Van Arx, of course, was in jail at that time?

A. Yes, sir; he was in jail.

Q. Now, when did you take him before the Court?

A. I took him before the Court at 10 o'clock the next morning. That was our usual hour to hold court. And as far as the grub is concerned, I took him a bucket of grub from the Jap restaurant, and set it in his cell; there was piece of pie, two sandwiches and a cup of coffee, and I said, "There is your supper." The next morning I went in there, and was going to get him another meal, but the

(Testimony of W. A. Shafer.)

bucket was just as I had left it the night before; it was heavy, and I looked in it, and I seen it was the same as it was the night before, and I left it there in the cell. At 10 o'clock I took him to the Judge, and he said he didn't want to try the case then, that he had a lawyer coming at 11 o'clock. I put him in jail again, didn't lock him in as I did the night before, but put him in the corridor so he could have access to the water and toilet, and after that I went to the beach again to get some more witnesses.

Q. Were these witnesses people who were there at the time?

A. They were; I remember of seeing them standing around, and I [57] wanted to try to find them.

Q. You say Mr. Van Arx himself said he didn't want to try the case in the morning?

A. He did; at 10 o'clock he said he didn't want to try it—he didn't ask for no delay or anything of that kind—he said his lawyer was coming over on the 11 o'clock boat.

Q. Mr. Shafer, I will ask you if Mr. Van Arx asked for bail, or asked for permission to give bail, at any time from the time he was arrested up to 10 o'clock in the morning? A. No, sir.

Q. I believe you said he was locked in a cell?

A. He was; I locked him in the cell.

Q. You heard him say he was in there with a crazy man?

A. When he went back he was in the jail with another man.

Q. That was in the morning, but the day before

(Testimony of W. A. Shafer.)

he said he was in that room with a crazy man?

A. No, sir; he was locked in a cell all night.

Q. When you took him back in the morning you say you left him in the corridor?

A. I did; yes.

Q. What condition is that jail in, in regard to being clean or dirty?

A. I will swear it was cleaner than his house when I saw it; I will swear the jail is kept in better condition than his house was when I saw it.

Q. Now, just tell the jury where that jail is located with reference to the place where you arrested Van Arx and the place where Mr. Henson had his office on Main Street in Douglas?

A. From Van Arx's place the jail is pretty close to a half mile this side of Van Arx's place; and it is about 120 feet or something of that kind, to Henson office, on this side of the [58] jail; I didn't pass his office at all in going to the jail.

Q. Then, as I understand, Mr. Shafer, in going up from the beach where this trouble occurred you get to the jail first? A. Yes, sir.

Q. Is the jail right on the street?

A. Yes, right on the street.

Q. And you keep right on going north to the main street of Douglas before you get to Mr. Henson's office? A. Yes, sir; that is right.

Q. I will ask you whether or not Mr. Van Arx stopped somewhere along in front of the bank as you were bringing him up to jail and told you there is Mr. Henson standing there in the door, and for you

(Testimony of W. A. Shafer.)

to take him over there?

A. No, sir; he didn't; he never said those words to me at all; in fact, he wouldn't speak on the way down town at all.

Q. Which way did you come up—did you come up from the armory or come up by the sawmill?

A. By the armory.

Q. And down to the grandstand where the ball ground is? A. Yes, sir.

Q. And when you got in front of the jail you crossed over to the jail? A. Yes, sir; I did.

Q. Mr. Shafer, had you said anything to Mr. Henson about going down on the beach to see Mr. Van Arx, or arresting Mr. Van Arx?

A. No, sir; you see, Mr. Henson didn't know I went down to the beach.

Q. Now, you say when you went to Mr. Henson's office in the afternoon he was not in?

A. Yes, sir; that is what I said.

Q. What hours does he usually keep there? [59]

A. I don't know whether it was 8 to 5 or 9 to 5, which; I think it was 9 to 5, if I am not mistaken; I am not positive, but I know he holds court at 10 o'clock.

Q. Was that the custom of Judge Henson to hold court in the morning? A. Yes, sir.

Q. All the time that you have been there?

A. Yes, sir; all the time that I have been on the job.

Q. Had you struck Mr. Van Arx or had you drawn any weapon upon Mr. Van Arx—

(Testimony of W. A. Shafer.)

Mr. COBB.—I object to counsel leading the witness constantly—it is not only leading but argumentative, and I object to it.

The COURT.—Change the form of it.

Q. Mr. Shafer, when did you draw your revolver?

A. After he had said those dirty words that he said I arrested him; just after I got up off the ground I says, “Old man, you are under arrest—come,” I said, “Old man, you can come along with me”; he said, “I don’t have to”; I said, “You old reprobate, you are under arrest.”

Q. That is after you got up?

A. Yes, that is the time I pulled the gun.

Q. Did you believe you had the authority to arrest Mr. Van Arx at that time?

Mr. COBB.—I object to that.

The WITNESS.—He was interfering with my business, that is what he was.

Mr. COBB.—I object to that; I don’t think a witness is allowed to testify of his belief in a thing; he can state what was said and done.

The COURT.—Objection is overruled. [60]

Mr. COBB.—Exception.

Q. Did you believe that you had authority to arrest Mr. Van Arx at that time?

A. I surely did; he was interfering with my business; I had orders from the United States Marshal to go over there and open the house, and Hunsaker had asked me to go down with him, and he told me, “I think he has got some things inside, and you know how it is in dividing up things.”

(Testimony of W. A. Shafer.)

Q. Never mind that, Mr. Shafer.

The COURT.—That will be disregarded, Gentlemen of the Jury.

Q. Mr. Shafer, did this occur in the presence of any other people?

A. Surely did; there must have been 20 or 25 people standing around.

Q. You are familiar with the street where this occurred?

A. I surely am; I am over that most every day.

Q. Is that a public street of Douglas?

A. Yes, sir.

Q. And this occurred on that street?

A. It did, yes, sir.

Q. Approximately, how many people would you say were there?

A. I would say there were 20 people at least.

Q. That is at the time that he used these words?

A. Yes, sir.

Q. Now, when you made the charge in court against Mr. Van Arx, do you remember what he was charged with?

Mr. COBB.—We object to that; the paper itself is the best evidence.

The COURT.—Objection sustained.

Q. Did you have any particular ill-feeling against Mr. Van Arx? A. No, sir; I did not.

Q. You knew him well? [61]

A. Yes, sir; I knew him well.

Q. What was your reason, Mr. Shafer, for drawing your gun after this fight?

(Testimony of W. A. Shafer.)

A. Well, when he went home to the house I didn't know but what he was going after his gun; I had arrested him for using a gun on a man, or threatening to use a gun; and I didn't know but what he had gone home after a gun; that is why I drew my gun when I told him he was under arrest.

Q. You say you had arrested him before for drawing or using a dangerous weapon?

A. I had; yes, sir; I have the date here; he was arrested on July 26, 1913, and paid a fine of \$25 for assault with a dangerous weapon.

Q. That was in the court at Douglas?

A. That was in the court at Douglas before Henson, and the man—I forget his name—the man made the complaint himself; I didn't make the complaint—some other man made the complaint against him, and even showed me where he had got hung on a nail in the house when he jumped away from the gun—whether the man was—

Mr. COBB.—I object to that.

Q. You had not made any complaint, then, prior to this time against Mr. Van Arx for any other offense?

A. No, sir; I had never made any complaint; I simply gave him a notice to clean some of his dirty, filthy toilets that he had; and they were not O'Connor's any more than they were mine—not a bit.

Q. That is a matter that he testified about this morning? A. Yes, sir.

Q. If you know about that, explain that to the jury.

(Testimony of W. A. Shafer.)

A. I went to Mr. Van Arx's place and I says this: "Mr. Van Arx, [62] you just paid a fine to the city, and you don't want to pay another, and I don't want you to pay another, but you have got to clean those toilets"; those are the words I said to that man, and then he tried to make it appear that it was the Myers' toilet—

The COURT.—I don't see what that has to do with the case.

Q. Anyway, you didn't serve any notice on him to clean O'Connor's buildings?

A. I should say I did not.

Mr. CHENEY.—That is all, you may cross-examine.

Cross-examination.

(By Mr. COBB.)

Q. You didn't take the padlock off?

A. No, sir.

Q. Have any key? A. No, sir.

Q. Had you received any word from Mr. Van Arx that he did not want you down there on those premises before you went down? A. No, sir.

Q. Are you sure of that? A. I am.

Q. On the trial of the case of the city of Douglas against Van Arx, Mr. Henson was present, wasn't he, the man who is now judge and couldn't be found?

A. I think he was.

Q. Didn't he testify in that case in your presence, and you didn't deny it, that Mr. Van Arx said that he didn't want you to go down there?

(Testimony of W. A. Shafer.)

Mr. CHENEY.—I object to that, if the Court please.

Mr. COBB.—I will withdraw the question. [63]

Q. When you went down there on this 11th day of September—it occurred the 11th day of September, 1914, did it? A. Yes, sir.

Q. You knew this property belonged to Mr. Van Arx, didn't you?

A. Why, after Hunsaker said he wanted to get in, —well, I thought I did; I thought I knew this was Van Arx's property.

Q. And when you got down there it was understood that Mr. Van Arx was going to get a key and open up the house, wasn't it?

A. No, sir; he said he wanted Van Arx and Jim Mitchell.

Q. Now, just answer my question. Mr. Van Arx tried to open the door with the key he had with him, didn't he?

A. He didn't have no key; he forgot it.

Q. Didn't he have a key that would not work?

A. I didn't see him try it.

Q. And he told you then and there, he asked you if you had a right, or any paper of any kind, authorizing your presence there?

A. That was after he first came up there.

Q. When you first went down there?

A. No; after he first came up to the house.

Q. You testified a minute ago that he told you he didn't want you around there if you didn't have any business?

(Testimony of W. A. Shafer.)

A. No; I didn't testify to any such thing.

Q. Isn't that a fact—isn't that what occurred?

A. After he came back with the key.

Q. He said you had no business there?

A. I had legal business there.

Q. I am not asking you what you had—it is for this jury to say whether you had legal business there or not—didn't he tell you that?

A. No; he did not. [64]

Q. What did he tell you?

A. He told me to go down and attend to the whores down in the other end of town.

Q. Did you do that?

A. He meant to say he would attend to the Indian whores down in the other end, I suppose.

Q. You think that is what he intended?

A. Yes, I suppose so.

Q. You knew perfectly well that Van Arx didn't want you there, didn't you?

A. I knew it after he came.

Q. You knew it was his property, didn't you?

A. I knew that Hunsaker lived there—

Q. You knew it was his property? A. Yes.

Q. Did you have a right of any kind—a paper of any kind authorizing your presence there?

A. No; it was verbal, word of mouth by Hunsaker.

Q. To go down there and open the door, and that was all, wasn't it? A. Well, I suppose—

Q. You didn't open the door?

A. He came to open the door.

Q. You could have opened the door by taking the

(Testimony of W. A. Shafer.)

hasp off if it was necessary, but that wasn't necessary?

A. I didn't know he had a key to the house.

Q. When he got back there and opened it you knew he had a key, didn't you? A. Yes.

Q. He told you after he opened the door that he didn't want you to go inside of the house, didn't he?

A. I didn't go in. [65]

Q. You started to, didn't you?

A. I walked behind him.

Q. And when he stepped in the doorway he said you could not go in?

A. He stepped outside of the door.

Q. Then you grabbed him, didn't you?

A. I was outside too.

Q. You grabbed him when he was in the doorway?

A. When he grabbed me, yes.

Q. What were you doing there at his doorway where he could grab you?

A. I was simply on the street on the outside of his door, on the street; I had a perfect right to be there.

Q. Then, when he got you down you hollered for help, didn't you? A. I didn't holler very loud.

Q. Loud enough to get help?

A. Mr. Hunsaker grabbed hold of him pretty quick.

Q. And they pulled him off? A. Yes.

Q. And when you arose from the ground you pulled your pistol, didn't you?

A. No; I did not.

Q. When you arose from the ground didn't you

(Testimony of W. A. Shafer.)

draw your pistol?

A. Not right then; no, sir.

Q. How long before you drew your pistol, after you got up?

A. I said: "Old man, you can come along with me."

Q. You had no warrant for him, did you?

A. I didn't need any when he committed an assault upon me.

Q. You answer my questions. I asked you if you had any warrant for him? [66]

A. No, sir.

Q. There was no complaint filed against him at that time? A. No.

Q. Well, when you drew your pistol and presented it to him he yielded to the arrest, didn't he?

A. No; I had to shove him 10 or 12 feet.

Q. Shove him with the point of your pistol?

A. I did not; I took my hand; I had the gun here (indicating).

Q. And you shoved him right up to the jail?

A. No, I did not; he walked after he found out he was under arrest, but it took him a long time to find out he was under arrest. He was wrestling pretty hard and putting up a pretty hard fight, and I will say that he is a skookum old man, and I will say that to his face.

Q. You were both cursing?

A. No, sir; I did not cuss, not a word—do you call reprobate cussing?

Q. That isn't all the words that you called him,

(Testimony of W. A. Shafer.)

is it? A. Well, no, sir; I didn't cuss.

Q. You didn't call him an old bastard?

A. I did not.

Q. You were both pretty angry and pretty warm, weren't you?

A. I tell you I was pretty warm because I was wrestling.

Q. And you know now everything that you did say?

A. I do, yes; as well as if it was yesterday; I will never forget that as long as I live; that is the only trouble I ever had in my life.

Q. Now, this wasn't very far from the middle of the day, was it? A. It was after 12 o'clock.

Q. It wasn't as late as 1 o'clock, was it?

A. Well, I wouldn't say it was as late as 1 o'clock; it was [67] close to 1—it was after 12; I usually go home at 12, and I had to walk up pretty close to a mile.

Q. Now, you didn't take him before Mr. Henson, the city magistrate? A. No, sir; I did not.

Q. You could have taken him there at that time, couldn't you?

A. Well, it was about the dinner hour, and I didn't know whether was in or not.

Q. You didn't try to find out?

A. No, sir; I did not.

Q. You didn't see him as you were going up town?

A. No, sir; I did not.

Q. Mr. Henson is usually at his office at 2 o'clock, isn't he?

(Testimony of W. A. Shafer.)

A. I think his office hours are from 9 to 5.

Q. You didn't take him before him that afternoon at all? A. No, sir.

Q. Just took him to jail and locked him up?

A. I went over about 4 o'clock—

Q. You could have taken him before him any time that afternoon?

A. I went home and took those clothes off and had them cleaned, and then came back down town—

Q. If you had not been occupying the afternoon in eating your dinner and having your clothes cleaned, you could have taken him before the magistrate that afternoon, couldn't you?

A. No, I was after witnesses after that, until about 4 o'clock.

Q. And while you were looking up witnesses trying to make a case against him, you let him lie in jail?

A. He didn't ask for bail, and he didn't put up no bail.

Q. Are you in the habit of throwing men in jail and keeping them over night before bail can be fixed? [68] A. I do lots of them.

Q. Is that a habit of yours?

A. What do you mean by habit?

Q. Arresting, putting them in jail and leaving them in until the next day?

A. Yes; I arrest lots of drunks and leave them in until the next morning at 10 o'clock, which is the usual hour for court.

Q. Now, do you mean to tell the jury that you

(Testimony of W. A. Shafer.)

occupied the whole of the afternoon in eating your dinner and getting your clothes cleaned?

A. No, sir; I don't; I told you a moment ago what I was doing.

Q. And the rest of the afternoon you were looking up witnesses? A. I was.

Q. Have you got any of those witnesses here that you found on that occasion?

A. Oh, yes, I have; yes, sir.

Q. Who of your witnesses are here that were there that afternoon?

A. I have two witnesses here that was there; there ought to be three, but one isn't here.

Q. Now, Mr. Shafer, when did you serve this complaint? A. It was about 11 o'clock the next day.

Q. After I got over there, wasn't it?

A. Yes, sir.

Q. Wasn't it after 12 o'clock?

A. No, sir; it was not; you came on the 11 o'clock boat.

Q. And I went and got Van Arx out of jail?

A. He asked for bail and he got it.

Q. And after that we went up to the courthouse and asked to see the complaint and then it was that you swore to it, and made the complaint? [69]

A. Yes; the complaint was made out at the time I took him in, but I simply neglected signing it.

Q. The time I took him in?

A. The time I took him into court at 10 o'clock.

Q. Who made out the complaint?

A. Mr. Henson.

(Testimony of W. A. Shafer.)

Q. You told him what to put in it, did you?

A. I did not; I told him, of course, that he had used this language, yes.

Q. What else did you tell him?

A. I don't recollect anything else; I told him in regards to the trouble we had.

Q. Did you tell him he had also resisted an officer, and to put that in the complaint?

A. Yes, sir; I told him that he resisted, and he did resist when he wouldn't walk when I told him to.

Q. I want you to answer my questions if you can. You told him to put in the complaint also that he had resisted an officer, didn't you?

A. No, I did not.

Q. How did he come to put it in there?

Mr. CHENEY.—I object to that, if the Court please, because the witness says he did not draw up the complaint; the Judge of the court drew up the complaint, and I don't see why this witness should be questioned so long about that when he didn't draw the complaint up.

Mr. COBB.—I will withdraw the last question.

Q. Mr. Henson was not down there—

A. Down where?

Q. Where you and Van Arx had this fight?

A. No. [70]

Q. And he knew nothing about what had transpired except what you told him when he drew the complaint up? A. No.

Q. That is the complaint that you swore to, is it?

A. That is my handwriting—that is the complaint,

(Testimony of W. A. Shafer.)

I guess—either the complaint or a copy of it.

Q. That is your signature to the affidavit, isn't it?

A. Yes; that is my signature.

Q. And you say you signed that and swore to it after I got over there on the boat that leaves here at 11 o'clock? A. I did.

Q. So it was sometime after 11 o'clock that day that you swore to the complaint?

A. It was about 11 o'clock.

Q. At the time that you took Mr. Van Arx in there at 10 o'clock, there was no complaint against him?

A. The complaint was made out, but he protested that he didn't want it tried—I failed to sign it.

Mr. COBB.—I offer that in evidence (referring to the complaint).

Mr. CHENEY.—I object to that as incompetent, irrelevant and immaterial for the reason that the Court has already granted a motion for a nonsuit so far as Mr. Henson is concerned and now this paper that is offered in evidence, the contents could only be against Judge Henson; Mr. Henson wrote it, this witness didn't write it; and it is only done, your Honor, it seems to me, to get the record of the other case before this jury; and besides that, there is no complaint here by Mr. Van Arx against these gentlemen that anything occurred the next morning when he was taken into court whereby he was in any way injured; he gave his bond and got just what [71] he asked for; he was brought into court by Mr. Shafer and they were ready to go on with the case, and he protested and said no, he did not want to go

(Testimony of W. A. Shafer.)

on, that he didn't want to do anything until his lawyer came; his request was granted.

The COURT.—Objection overruled.

(Whereupon said complaint was received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. COBB.—That is all.

Redirect Examination.

(By Mr. CHENEY.)

Q. Mr. Shafer, I understand the complaint, you say, was made out in the morning when you took Mr. Van Arx to jail?

A. It was; it was made out, but I neglected signing it, because he protested going on with the trial—it was just neglected.

Q. You had made the complaint—that is, orally to the Court? A. Yes, sir; I did.

Q. Did you see the Judge draw the complaint up?

A. Yes, sir; I did.

Q. How long was Mr. Van Arx in court that morning at 10 o'clock?

A. I don't suppose it was over half an hour.

Q. Half an hour?

A. Not over that; it might have been 15 minutes; he simply protested when he came in, and said his lawyer was coming on the 11 o'clock boat, and, of course, the Judge waited until the lawyer came, and in the meantime we put him back into the jail.

Q. Mr. Cobb asked you about who those witnesses were, who are the witnesses you found on the beach there? [72]

A. One was Willis, and the other was Charlie

(Testimony of W. A. Shafer.)

Stroupe, and Annie Joseph, and Frank Dean; of course Frank Dean went to Prince Rupert.

Q. Those are the same witnesses subpoenaed here in this case? A. Yes; they are the same witnesses.

Mr. CHENEY.—That's all.

(Witness excused.)

Mr. CHENEY.—I want to introduce ordinance No. 39 of the city of Douglas, and if Mr. Cobb has no objection to my introducing it without calling the city clerk, I will not call him.

Mr. COBB.—That is all right—but I object to this because in so far as this case is concerned the ordinance is absolutely void, for the reason that it is too broad and uncertain in its scope.

The COURT.—Objection overruled.

Mr. COBB.—Exception.

(Whereupon said ordinance was received in evidence and marked Defendant's Exhibit "A," and read to the jury as follows: "Ordinance No. 39. Defining certain misdemeanors and prescribing a penalty therefor. * * * Disorderly Conduct. Section 15. If any person shall be guilty of disorderly conduct, or of using profane or obscene language within the corporate limits of the town of Douglas, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the municipal jail for a period not exceeding ninety days, or by both such fine and imprisonment, in the discretion of the municipal magistrate.")

Testimony of Tom Willis, for Defendant.

TOM WILLIS, a witness introduced on behalf of the defendant, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified in answer to questions as follows:

Direct Examination.

(By Mr. CHENEY.)

Q. State your name. A. Tom Willis.

Q. Where do you live? A. Douglas.

Q. Where do you work? A. Treadwell.

Q. The Treadwell mine?

A. I used to work in the Treadwell mine; now I am working on the ditch.

Q. The Treadwell ditch? A. Yes, sir.

Q. Were you in and about Douglas on or about the 12th of September of last year when there was some trouble between Mr. Van Arx and Mr. Shafer?

A. Yes, sir.

Q. Where were you at that time? A. What?

Q. What part of the town were you in?

A. The beach side of Steven's store, at this house.

Q. That is on the street down on the beach there?

A. On the beach side of the track.

Q. Now, will you state to the jury what you saw and what you heard of this trouble between Shafer and Van Arx—just state to the jury what you heard and what you saw.

A. I worked in Treadwell on the night shift in September, and [73] when I got up before noon I walked down without my hat, and walked right straight to see Charlie Straupe.

(Testimony of Tom Willis.)

Q. Is that the gentleman sitting in the back seat (indicating)?

A. Yes, sir; and he asked me, he said, "Are you up already? I say, "Yes," and I went in there; a few minutes afterwards I heard a noise outside and I looked out and I saw Mr. Shafer and Van Arx out there, and I see Van Arx go up to his house; after he go up he called some kind of words to Mr. Shafer; he swore to him, and called Shafer "You dirty bastard, you got no business to come in my house, you son-of-a-bitch," he say; after that Shafer got hold of him and Shafer slipped down and Van Arx was on top of him, and Mr. Hunsaker pulled him off, and after he got up Shafer took out a gun out of his pocket—held it down, didn't point it at him—and told Mr. Van Arx, "Come, I am going to arrest you"; and he put his hand down with the gun, and when he come half way to Mike's store he had his gun in his pocket, and go down to arrest Van Arx.

Q. Where was it, on the street?

A. It was right up close to the street, up where the hospital comes down.

Q. You mean the street that runs from Douglas to Treadwell?

A. Yes, sir; right where the hospital street comes down; right on the corner I was standing.

Q. Where were Van Arx and Shafer standing when you heard Van Arx use those words?

A. Mr. Van Arx was standing right against his house, and Shafer was standing on the street; they started to fight and Mr. Shafer slipped down on the

(Testimony of Tom Willis.)

sidewalk and Van Arx fell right on top of him, and he called and Mr. Hunsaker pulled him off. [74]

Q. You say Mr. Van Arx was standing in front of his door? A. Yes, sir.

Q. Shafer was standing in front of him?

A. Yes, sir.

Q. You heard Van Arx say those words?

A. I heard what he said.

Mr. CHENEY.—That is all.

Cross-examination.

(By Mr. COBB.)

Q. Where were you?

A. Well, I was standing right where the hospital street comes out, at the corner.

Q. How far from the door? A. Not very far.

Q. Well, how far?

A. I couldn't measure right to the place, it is about 15 feet, I think.

Q. About 15 feet? A. Yes, sir.

Q. You say Mr. Van Arx was inside of his door?

A. No, sir; the door was shut.

Q. The door was shut? A. Yes, sir.

Q. He was right on the threshold of it?

A. Yes, sir.

Q. And where was Shafer standing?

A. On the sidewalk, near to Mr. Van Arx.

Q. On this little porch or elevated place?

A. He was standing right against his door, and Shafer was standing on the street, and they started to fight; Shafer slipped down on the sidewalk—the sidewalk was right on top of the [75] porch, a

(Testimony of Tom Willis.)

little porch and step, and he fell right down, and Mr. Van Arx was on top, and Mr. Hunsaker pulled him off.

Q. What did Shafer say?

A. Oh, I didn't hear what Shafer said; that is all I heard, what Van Arx said, "You have got no business to come in my house."

Q. Was Shafer saying anything?

A. I heard Van Arx say, "You have no business in my house, you bastard."

Q. Do you remember anything that Shafer said?

A. That is all I remember, what Van Arx said.

Q. Don't you remember what Shafer said?

A. No, sir.

Q. Why don't you remember?

A. That is all I heard; when he come up he, "You come right down, I am going to arrest you."

Q. You didn't see Mr. Shafer until he got up?

A. No.

Q. Do you remember whether he did say anything or not? A. Well, I didn't hear what he said.

Q. Could you hear him talking without understanding it? A. Who?

Q. Shafer.

A. No, I didn't understand what he said.

Mr. COBB.—That is all.

Redirect Examination.

(By Mr. CHENEY.)

Q. How many people were there around there?

A. Well, lots of people, lots of Greeks, Slavonians were there.

(Testimony of Tom Willis.)

Q. At the time Van Arx was using this language, how many people [76] do you think were there?

A. A lot of people, twenty or twenty-five.

Q. How many would you say?

A. I know Johnnie was with me, and Annie Joseph was right close to us, and Frank Dean was there, too, and there were Russians, and all kinds of mixed people there.

Q. What was that?

A. There were a lot of people there, I cannot remember.

Mr. CHENEY.—That is all.

(Witness excused.) [77]

Testimony of Charley Straupe, for Defendant.

CHARLEY STRAUPE, introduced as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Direct Examination.

(By Mr. CHENEY.)

Q. Your name is Charley Straupe?

A. Yes, sir.

Q. What is your business?

A. Treadwell, mining.

Q. Are you working now?

A. Well, I don't work for 17 days.

Q. Why? A. Well, I got hurt in my eye.

Q. What did you get in your eye, a rock?

A. A rock.

Q. Were you in Douglas last September?

(Testimony of Charley Straupe.)

A. Yes, sir.

Q. Where do you live, Charley?

A. I live in Douglas.

Q. Do you know this house where Hunsaker and his wife lived? A. Yes.

Q. You know that place? A. Yes, sir.

Q. Did you see any trouble between Mr. Van Arx and Mr. Shafer one day in September on the beach?

A. Yes, sir.

Q. How far was your cabin from this house where Hunsaker and his wife lived?

A. About 30 or 40 feet from my place.

Q. Just tell the jury what you saw, Charley?
[78]

A. Well, I was working the night shift, and just about a half an hour I got up and opened the door, and I saw Tom Willis and he spoke to me; he was standing on the street, and I says, "Come in," and he came inside, and about 10 minutes afterward we heard some talking on the street, and I says to him, "My, there is something wrong," so we opened the door and we stepped outside, and I see Mr. Shafer, Mr. Van Arx and Mr. Hunsaker was there talking together—we walked right close and I see Mr. Van Arx was standing up on his front door, right at his front door, and Mr. Shafer and Hunsaker were standing on the street; and so Mr. Shafer, he asked him to go inside, and he said, "You old whore son-of-a-bitch," he says, "You go down the line and watch the sports"; he says, "You have got no business in my house." Well, it seemed to me Mr. Shafer

(Testimony of Charley Straupe.)

walked about three feet, and he came right close to him, and I don't know which one grabbed the other first, I cannot tell, but Mr. Shafer was down and Mr. Van Arx was on top, and Mr. Shafer says, "Take him off"; so Mr. Hunsaker and a few of the other fellows took him off.

Q. Took Van Arx off of Shafer?

A. Yes. So Mr. Shafer says, "You old rascal, you are under arrest"; so Mr. Shafer pulled his gun, and held it down, and Mr. Van Arx didn't want to go, and he said, "You are are under arrest, you old rascal"; he had to drag him about 10 or 15 feet, and he walked all right after that.

Q. Did Mr. Shafer go into Mr. Van Arx's house?

A. No, sir.

Q. How many people were there?

A. About 20 or 25, children, ladies and everything.

Q. This house that Hunsaker lived in, where is it with reference to the street? [79]

A. Well, it is about three feet.

Q. Faces on the street, does it?

A. Well, it has got sort of a little sidewalk about three feet from the house to the street, and that is about a foot down the street lower.

Q. What do you mean, that there was a raise built up with a 2 x 4, or something like that?

A. It is a little porch made a foot above the street.

Q. Something like that in the floor there (indicating raised witness stand in courtroom)?

A. Yes.

Mr. CHENEY.—That is all.

(Testimony of Charley Straupe.)

Cross-examination.

(By Mr. COBB.)

Q. Did you hear what Mr. Shafer said?

A. That time when I heard was when Mr. Van Arx didn't have him in his place, and at that time he started to fight, and that is all I hear.

Q. Didn't you hear Mr. Shafer use any language?

A. No.

Q. Didn't hear him call him an old reprobate?

A. No, sir; that time he dragged him down the street he called him an old rascal.

Q. Now, at the time you say you cannot tell which one grabbed the other first?

A. No, sir; there was lots of people all around there.

Q. At the time they grabbed each other, you say, Van Arx was standing in his door?

A. Yes, sir.

Q. And Shafer was up on this little porch? [80]

A. Yes, sir; Shafer was on the street.

Q. Up on this little elevated place?

A. No; Mr. Van Arx was at the door and Mr. Shafer was on the street.

Q. And he didn't step off of this little place?

A. He walked to Mr. Van Arx.

Q. What did he do with his pistol after he pulled it out?

A. Why, he pulled it out and he held it down.

Q. Held it down like that (indicating)?

A. Yes; held it down.

Q. Didn't present it at him? A. No, sir.

(Testimony of Charley Straupe.)

Q. Didn't order him along with a pistol in front of him? A. Yes, sir.

Q. Sure of that? A. I was right close.

Mr. COBB.—That is all.

Redirect Examination.

(By Mr. CHENEY.)

Q. Did you understand that last question, Charley, that Mr. Cobb asked you; he asked you if he pushed him along with a pistol. A. Yes.

Q. How did he push him along?

A. Well, he had his pistol in his hand and had his arms out like this (indicating), and he said, "You old rascal, you are under arrest."

Q. Now, you said it was something like this floor here—explain to the jury whether the house is higher than the street [81]

A. No, the street is higher.

Q. There is a jog like that? A. Yes.

Q. And the house stands in here (indicating)?

A. Yes.

Q. The house is lower than the street?

A. Yes, sir.

Mr. CHENEY.—That is all.

(Witness excused.) [82]

Testimony of Annie Joseph, for Defendant.

ANNIE JOSEPH, a witness introduced on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

(Testimony of Annie Joseph.)

Direct Examination.

(By Mr. CHENEY.)

Q. What is your name?

A. Annie Joseph.

Q. Where do you live? A. Douglas.

Q. Were you in Douglas last September, last year?

A. Yes.

Q. Do you remember some trouble between Mr. Van Arx and Mr. Shafer? A. Yes.

Q. Last September, about the 14th, about the middle of September? A. Yes, I see that.

Q. You saw that? A. Yes.

Q. Just state to the jury what you saw about that trouble—tell what you saw.

A. Well, I see—just as I come out of my sister's house I see the people down there, and I go there, and I see Van Arx talking, and he stand just at the door, and Shafer stand up behind Van Arx, and talking; I couldn't hear what he said, talking to him, and he get the key and wanted to open, and Shafer stand up, and Van Arx, he calls son-of-a-bitch, Shafer.

Q. He called what?

A. He called son-of-a-bitch, that is all I hear.

A. He called that to Shafer? [83]

A. Van Arx and he started to talk, Van Arx, and Shafer down and Van Arx on top, and Hunsaker he go over and he took Van Arx off and let up Shafer, and get up Shafer, and said he got to arrest him, and Van Arx was talking, and he took the gun out of his pocket, and after he come, that is all I know.

Q. You saw you couldn't understand Van Arx very well?

(Testimony of Annie Joseph.)

A. Well, I could not understand, that is all I heard; he called him son-of-a-bitch.

Q. Did Mr. Shafer go inside of Mr. Van Arx's house?

A. No, I didn't see that; that is all I see.

Q. Were there any people there besides you?

A. What?

Q. When Mr. Van Arx used these words was there anyone there besides you?

A. Lots of people, all kinds of different people, but I didn't look to see who was there.

Mr. CHENEY.—That is all.

Cross-examination.

(By Mr. COBB.)

Q. You have never been called as a witness concerning this matter any time before, have you—you were not called as a witness in the trial of the case of the City of Douglas against Victor Van Arx, were you? A. I cannot understand much English.

Q. How is that?

A. I don't know what you said.

Q. You don't know?

A. I don't understand much.

Q. You are a native woman, are you? A. Yes.

Q. You have never been called to tell this thing in court before, [84] have you—this is the first time you have ever told about it in court?

A. Before I was witness, but I never come in here.

Q. Never been in court before about this?

A. Yes.

Q. Have you?

(Testimony of Annie Joseph.)

A. Oh, I never come in here before.

Q. Never been to court before? A. No.

Q. You told Mr. Shafer about it and he told you to come over? A. Yes.

Mr. COBB.—That's all.

(Witness excused.) [85]

Testimony of John Henson, for Defendant.

JOHN HENSON, a witness introduced on behalf of the defendant, who being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Direct Examination.

(By Mr CHENEY.)

Q. Mr. Henson, what position did you occupy in September, 1914, at Douglas?

A. I was city clerk and municipal magistrate of the city of Douglas.

Q. What position did Mr. Shafer occupy at that time? A. He was marshal.

Q. You were city clerk, and you are familiar with the ordinances there of the city? A. Yes, sir.

Q. I will ask you whether or not this ordinance that is introduced, No. 39, whether you know of your own knowledge that that was in force at the time, September, 1914? A. I do; yes, sir.

Q. I wish you to state what occurred in your office on the morning of the 13th, I believe it was—the next day after this trouble between Mr. Van Arx and Mr. Shafer—what occurred with reference to Mr. Van Arx's case?

A. I think that was the 11th of September; I be-

(Testimony of John Henson.)

lieve the records will show it was the 11th.

Q. It was either the 11th or 12th; they alleged the 11th in the complaint. What I want you to state is what occurred before you there as municipal magistrate that morning when Mr. Shafer brought Mr. Van Arx into the courtroom.

A. It was, I think, about 15 or 20 minutes past noon, it was shortly after—

Q. I don't mean that, I mean in the morning.
[86]

A. You mean the morning of the trial, is that what you mean?

Q. The first time he brought Mr. Van Arx into your office?

A. Oh, yes; that was the morning of the 12th, of course.

Q. Mr. Shafer didn't bring Mr. Van Arx in the day he was arrested, that afternoon?

A. Oh, no; excuse me. I thought you were asking me what occurred on the day of the arrest of Mr. Van Arx.

Q. You don't know anything about the arrest, do you? A. Very little.

Q. What occurred in the morning, the first time Mr. Van Arx was brought into your courtroom, with reference to that case?

A. Well, he was brought into the courtroom by the marshal, and we proceeded to make out the complaint; I listened to what the marshal told me, and I originally wrote the complaint as being for,—I think it read originally—that original complaint that I drew—resisting an officer, and after I had heard what

(Testimony of John Henson.)

Mr. Shafer said, I made up my mind that I didn't think the case was strong enough to be prosecuted on that charge, and then I wrote the complaint charging him with using obscene and profane language.

Q. Under what ordinance, Mr. Henson?

A. Under ordinance 39, I think, section 13.

Q. Now, what happened when Mr. Van Arx came in there—did you immediately send him back to jail, or what did you do?

A. Well, Mr. Shafer brought in Van Arx from the jail, and they sat down and I immediately began to read this complaint to Mr. Van Arx; he put up his hands this way (indicating), and he didn't want to hear anything; he said, "I don't want to hear anything; my attorney comes on the 11 o'clock boat," [87] and he says, "I don't want to go to trial now"; he says, "I don't want to hear nothing." I said, "All right; you want me to put the case off?" "Yes, I don't want to hear nothing about it," he said, that his attorney was coming over on the 11 o'clock boat and I set the case for 2 o'clock and Mr. Van Arx was taken back to jail again. That is all that happened that morning at that time.

Q. You continued the case then and told the marshal to take him back to jail? A. I did.

Q. Was the case taken up afterwards?

A. Yes, sir.

Q. And tried? A. Yes, sir.

Q. Did you hear Mr. Fuesi's statement here on the witness-stand, Mr. Henson, about what he said to you about offering to go good for Mr. Van Arx?

(Testimony of John Henson.)

A. I heard all he said; yes, sir.

Q. Will you state to the jury what occurred at that time, and what time it was that it occurred?

A. That afternoon I was pretty sick; I had cramps in my stomach and I felt very bad; I usually stay in my office until 5 o'clock, but that afternoon I went out and got a drink of brandy—I was suffering from cramps in my stomach, and I walked up to my house—I think it was in the neighborhood of somewhere about 4 o'clock when I left my office—I went up to my house, and my wife was away, and there was nobody in the house when I got up there; I got to feeling pretty bad and I laid down on the bed—I was in pain, and finally when I did come to myself I should judge it was 5 o'clock or a quarter past 5, possibly, and I thought to myself, [88] “I feel pretty rocky; I think I will go and get a cup of black tea.” I had been in the habit of eating at the Jap restaurant at the corner of the wharf, and I walked down D Street to the Jap restaurant and had a cup of tea; as I was going down there I thought I would go up to the office and lock up my safe and call it off. Mr. Fuesi came out from one of the stores—he was standing somewhere, whether it was in front of his own store or whether it was in front of some other store, possibly in front of the drug store, I could not say—he came out to me and he said, “Say, what are you holding Van Arx for?” He says, “You have got no right to arrest him”; he says, “A man has got a right to protect his own property.” I said,

(Testimony of John Henson.)

“Well, I don’t know about that; well, he is in jail.” He said, “I know he is, I heard so, but you cannot keep him in jail.” I said, “Well, I guess I can—I guess we can,” and with that he began to talk some more about the case—about the merits of the case, and about the right of the marshal to arrest him, and all this, and I said, “I don’t want to talk this case with you at all.” With that I walked away, and that is about the substance of what Mr. Fuesi said to me; he never asked me for bail for the man.

Q. Was Mr. Hunsaker with him?

A. I didn’t see him, sir; if he was there I didn’t see him.

Q. Mr. Hunsaker didn’t say anything to you?

A. No, sir; he might have been on the street by the side of him, but if he was I didn’t see him.

Q. You say Mr. Fuesi did not say to you that he would go good for Van Arx?

A. No, sir; he didn’t; he started to argue the merits of the arrest with me, and I think I wound up by saying exactly [89] what he said, “Nothing doing, I don’t want to talk to you any more; there is nothing doing until to-morrow morning at 10 o’clock”; I think that was nearly all of what I said to Mr. Fuesi.

Q. What time of day was this, Mr. Henson?

A. That was in the neighborhood of half-past five—I know it was shortly after 5 o’clock; I looked at my watch in my house, and I thought it was my lunch hour—supper time—I never eat but two meals a day,

(Testimony of John Henson.)

breakfast before I go to the office and 5 o'clock when I go to my dinner—and I know it was in the neighborhood of half-past 5 o'clock.

Q. State what your custom was with reference to your office hours as city magistrate?

A. Well, my office hours are from 9 o'clock in the morning until 5 o'clock at night—that is my regular office hours; I always lock up my office at 5 o'clock, and sometimes I would go back after supper and sometimes I would not; sometimes I would stay there if I was very busy, and sometimes I would go to my desk and work in the evening.

Q. These city cases that came before you as magistrate, what was your custom with them?

A. My custom, as a rule, I called them at 10 o'clock in the morning, unless the Marshal came and said, "Here, this man is arrested for some slight offense, and he wants bail, or has offered me bail," or something like that—then I would bring him over right away.

Q. Now, when Mr. Van Arx came into court at 10 o'clock in the morning, did he ask you for bail?

A. No, sir; he never opened his head about bail; never said nothing; never said he didn't want to go back to jail or anything of the kind; not a single human being ever spoke [90] a word to me about bail for that man until Mr. Cobb came over, and Mr. Cobb says to me, "What are you doing arresting a man here without a warrant and refusing him bail"?

(Testimony of John Henson.)

I said, "Mr. Cobb, nobody has offered me bail for that man."

Q. Did you see Mr. Shafer sometime in the afternoon there after he arrested Von Arx?

A. Yes, sir; I did.

Q. What condition was he in?

A. He came past the door—I think it was sometime after one o'clock—and he passed the door, and as he passed there he stood and looked in the door, and he said, "I have got Von Arx down here," and I said, "You look as though you had somebody"; and he was mud from head to foot, his face was scratched, and that is all I said. He said, "I am going on to get my dinner and cleaned up," and that is all I saw of the marshal.

Q. You stated that no one came to your office in regard to Mr. Von Arx? A. Absolutely no, sir.

Q. Did you have any ill feeling against Mr. Von Arx?

Mr. COBB.—I object to that as immaterial.

A. No, sir, none whatever. I have had two or three cases before with him, but I always tried to do the right thing, and I believe Mr. Von Arx will say that I never did anything against the law with him.

Mr. COBB.—I don't see how that is material.

The COURT.—I don't see, Mr. Cheney— ?

Mr. CHENEY.—That is all. [91]

(Testimony of John Henson.)

Cross-examination.

(By Mr. COBB.)

Q. Mr. Henson, do you mean to tell this jury that old Theodore Hunsaker, who is now dead, did not go to you and ask for bail immediately after Mr. Von Arx was arrested?

A. I say absolutely he never did.

Q. And Mr. Fuesi did not go to you with Hunsaker afterwards?

A. Mr. Fuesi never was in my office that day.

Q. There in front of Bloedthorn's store?

A. I have told you just exactly what passed on that evening; there was nothing else happened, and nobody ever came in that office—he or anybody else.

Q. When you did fix the bail you fixed it at \$50?

A. When you asked for it, of course.

Q. And it was furnished instantly?

A. Yes, sir.

Q. After I got over there? A. Yes, sir.

Q. When was it that you saw the marshal just after this arrest,—Shafer?

A. He was passing my door, as I told you; he had to pass my door in going from the jail, and he stood in my door and said just what I told you.

Q. You didn't see him on the way to jail with Von Arx at all?

A. I couldn't very well unless I had been out looking—

(Testimony of John Henson.)

Q. I am asking you if you did see him on the way to jail?

A. No, sir; I didn't know the man was arrested until Mr. Shafer stood in front of my door and told me he had him arrested.

Q. You say your office hours are from 9 to 5?

A. Yes, sir.

Q. And on this day you were in your office from 9 to about 4 o'clock? [92]

A. Yes, sir; I was.

Q. All the afternoon. And if this man had been brought to you to have his bail fixed, you would have done so?

A. Certainly; I never refused a bail yet.

Q. You knew that Mr. Von Arx could furnish any reasonable bail?

A. I didn't know anything about it.

Q. You didn't?

A. I didn't know anything about it; I am not supposed to know.

Q. That isn't the point. I am asking you if you didn't know as a matter of fact that for any violation of your city ordinances, your little petty misdemeanors, Mr. Von Arx could furnish any reasonable bail?

A. I should judge he can; I never had any reason for denying the bail on account of his not being good for it.

Mr. COBB.—That is all.

(Testimony of John Henson.)

Mr. CHENEY.—That is all.

(Witness Excused.) [93]

Testimony of Nakimuri, for Defendant.

NAKIMURI, a witness introduced on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. CHENEY.)

Q. Nakimuri, where do you live?

A. Douglas—now here in Juneau.

Q. What were you doing last September in Douglas? A. September in Douglas.

Q. What were you doing there?

A. I was in Douglas in business there.

Q. Ran the Owl Restaurant?

A. Yes, sir; all the time there was some people in there.

Q. Did the city marshal come to your place for meals for the prisoners? A. Yes.

Q. Did you keep a book and keep track of how many meals you furnished?

A. I have a book here.

Q. Have you got anything in that book showing how many meals you furnished to Mr. Shafer for the jail on the 11th of September, last year? See if you can find that. A. 11th, one lunch.

Q. 12th? A. Two lunch.

Q. Was that all the meals you furnished?

A. Oh, no; 14th, 15th, 17th, 18th, 19th, 20th, 21st

(Testimony of Nakimuri.)

and 22d; that is all September.

Q. Does that show a difference between dinner and lunch, or just lunch?

A. Some meals, some lunch; you know just one marked down; you [94] know city meal it don't make any difference, always square meal.

Q. And that shows how many meals or lunches there on the 11th?

A. 11th September, 2 lunches; 12th, one lunch; 13th, two lunches.

Q. On the 11th is two lunches?

A. 11th, two lunches.

Q. What kind of lunches are they, generally, Nakimuri? A. What?

Q. How did you put them up—what did they generally have? A. What?

Q. What did you put them in—pail, basket or what? A. Bucket.

Q. Who did you give those to—who came after them—who gets them?

A. All the time comes in here Mr. Shafer.

Q. And you charged those to the city?

A. Oh, yes; charge all every month.

Mr. CHENEY.—That is all.

Cross-examination.

(By Mr. COBB.)

Q. You furnished all the meals to the jail, didn't you? A. What?

Q. At that time you furnished all the meals to the prisoners in jail, didn't you?

(Testimony of Nakimuri.)

A. I don't know much English, you know.

Q. What I am getting at is, did Mr. Shafer get meals for the prisoners anywhere else?

A. Yes; all the time Mr. Shafer.

Q. From somebody besides you, or did he get them from you? A. Yes; Mr. Shafer come in.

Q. He didn't get any meals from anybody else except you? A. Yes. [95]

Q. I am afraid you don't understand me. Was there any other restaurant over there where Mr. Shafer got meals for the prisoners except yours?

A. Yes; I give to him.

Q. You gave him all the meals furnished?

A. Yes.

Q. Now, then, on September 11th how many meals did you furnish? A. Two lunch.

Q. Was that all the meals you furnished?

A. Yes.

Q. Just two meals?

A. Yes; morning time, evening time, all lunch.

Q. You mark them all lunch? A. Yes.

Q. On the 11th you furnished just two meals?

A. Yes; 11th, two meals; 12th, one meal; 13th two meals.

Q. On the 12th how many meals did you furnish?

A. Three meals.

Mr. COBB.—And on the 11th you only furnished two meals. That is all.

Mr. CHENEY.—That is all.

(Witness Excused.) [96]

**Testimony of W. A. Shafer, for Defendant
(Recalled).**

W. A. SHAFER, the defendant herein, upon being recalled on his own behalf, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. CHENEY.)

Q. Mr. Shafer, how many prisoners did you have in the jail on the 11th? A. I had two.

Q. Von Arx was one of them?

A. Yes, sir; and Victor Kosky was another; had two Victors in it.

Q. They were the only two?

A. Yes, sir; that was all.

Q. On the 12th how many did you have?

A. He was let out on the 12th, and Victor was still in; that is the man he said was crazy—he was intoxicated.

Q. As a matter of fact was he crazy—was he adjudged insane?

A. No, sir; he had been drinking pretty heavy, and of course that was all.

Q. He was let out when?

A. Von Arx was let out on the 12th, and Victor was let out shortly after. I think he paid a fine of \$20. When I got a meal,—I would take them sometimes to the restaurant. What he calls a lunch is when I would take a bucket and carry it to the prisoner—that was lunch; when I took the prisoners to the restaurant, that is a meal; of course they were all the same price.

(Testimony of W. A. Shafer.)

Q. You went to the restaurant and got this and carried it to him? A. Yes, sir.

Mr. CHENEY.—That is all.

Mr. COBB.—You didn't take Von Arx up to the restaurant for any meals, did you? [97]

A. I carried him a bucket.

Q. (By Mr. COBB.) I asked you if you took Von Arx up to the restaurant for any meals?

A. No, sir; I did not.

Q. (By Mr. CHENEY.) You didn't take the other fellow up, did you, either?

A. No, sir; I did not.

Mr. CHENEY.—That's all.

Mr. COBB.—That's all.

(Witness Excused.)

Mr. CHENEY.—That is our case, your Honor.

DEFENDANTS REST. [98]

REBUTTAL.

Testimony of John Fuesi, for Plaintiff (In Rebuttal).

JOHN FUESI, a witness introduced upon behalf of the plaintiff, upon being recalled and having been previously duly sworn, testified in rebuttal as follows:

Direct Examination.

(By Mr. COBB.)

Q. Mr. Fuesi, you have been sworn?

A. Yes, sir.

Q. You heard the statement of Mr. Henson as to the conversation between you and him?

(Testimony of John Fuesi.)

A. Yes, sir.

Q. Did any such conversation as that occur?

A. In a certain way.

Q. What part of it occurred?

A. I offered to go bail, me and Theodore, and that was right in the front of Bloenthorn's store, and I noticed that Mr. Henson was pretty well intoxicated—the way it looked to me—and he said, “Nothing doing until to-morrow at 10 o'clock.”

Q. That is all the conversation that occurred?

A. Yes.

Mr. COBB.—That's all.

Cross-examination.

(By Mr. CHENEY.)

Q. Why didn't you say that before when you testified? A. It wasn't necessary.

Q. You found it necessary since you thought it over?

A. Yes, sir; I didn't think he would put me down a liar.

Mr. CHENEY.—That's all.

(Witness Excused.) [99]

**Plaintiff's Exhibit No. 1 — Complaint, City of
Douglas vs. Von Arx, in Municipal Magistrate's
Court.**

Entered p. 516.

*In the Municipal Magistrate's Court, for the City of
Douglas, District of Alaska, Division No. 1.*

CITY OF DOUGLAS,

Plaintiff,

vs.

VICTOR VON ARX,

Defendant.

Violation Section No. 15 of Ordinance No. 39 of the
City of Douglas.

Victor Von Arx is accused by W. A. Shafer, marshall, in this complaint, of the misdemeanor of disorderly conduct committed as follows: That said Victor Von Arx did, in the city of Douglas, in the District of Alaska, and within the jurisdiction of this Court, on the eleventh day of Sept., 1914, ~~resist the authority of said marshall~~ and use vile, profane and obscene language within the corporate limits of the town of Douglas, contrary to and in violation of Section No. 15, of Ordinance No. 39, of the city of Douglas, in the District of Alaska, which ordinance was passed and approved by the common council of the city of Douglas the tenth day of August, 1908.

JOHN HENSON.

United States of America,
District of Alaska,
City of Douglas,—ss.

I, W. S. Shafer, being first duly sworn, depose and say that I am the person who executed and signed the complaint in the above-entitled and foregoing action; that I have read said complaint, know the contents thereof, and that the same is true.

W. A. SHAFER.

Subscribed and sworn to before me this twelfth day. Sept. 14.

JOHN HENSON,

Municipal Magistrate for the City of Douglas.
[Seal of the City of Douglas.]

[Written in pencil]: Case called at 10 A. M. Sept. 12 and continued to 2 P. M. on request of defendant, for appearance of atty. Continued to 2 P. M. Monday, Sept. 14.

Plff's Exhibit No. 1, Received in Evidence Oct. 23, 1915, in Cause No. 1247-A. J. W. Bell, Clerk. By John T. Reed, Deputy. [100]

And the above and foregoing was all the testimony and evidence offered or introduced by the respective parties, and thereupon the following motion was made:

"Mr. CHENEY.—Now I desire to make a motion for an instructed verdict for the defendant Shafer in this case, or the defendants in this case; (of course the nonsuit) has been granted in favor of defendant Henson, and I believe the case is only

against defendant Shafer), on the ground that plaintiff has failed to introduce sufficient evidence to substantiate the allegations of his complaint; failed to prove any conspiracy; failed to prove any injury or damage of any kind.

(Argument by Mr. COBB.)

The COURT.—Gentlemen of the Jury: Under the law the plaintiff in this case has not made a case that is sufficient to go to the jury. It becomes my duty to instruct you that it is your duty to find a verdict in favor of the defendant. Elect one of your number as foreman and sign the verdict that is presented to you—you can do that without leaving your seats.”

To which instruction and ruling of the Court the plaintiff then and there excepted.

And because the above and foregoing matters do not appear of record, I, Robert W. Jennings, the judge before whom said cause was tried, do hereby certify to the above Bill of Exceptions as correct and allow the same and order it filed as a part of the record herein, and during the term at which said cause was tried.

Dated this the 29th day of January, 1916.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska, First Division. Jan. 31, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [101]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1247-A.

VICTOR VON ARX,

Plaintiff,

vs.

W. A. SHAFER and JOHN HANSON,

Defendants.

Assignment of Errors.

Now comes the above-named defendant and plaintiff in error, Victor Von Arx, and assigns the following errors committed by the Court on the trial and in the rendition of the judgment, upon which he will rely in the Appellate Court:

I.

The Court erred in granting the Motion of the Defendant, John Hanson for a nonsuit.

II.

The Court erred in directing a verdict for the defendant W. A. Shafer.

And for said errors the plaintiff, Victor Von Arx, plaintiff in error herein, prays that the judgment herein be reversed and said cause remanded and for such other orders and directions as to the court may seem proper.

J. H. COBB,

Attorney for Victor Von Arx, Plaintiff in Error.

Filed in the District Court, District of Alaska,
First Division. Jan. 31, 1916. J. W. Bell, Clerk.
By John T. Reed, Deputy. [102]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1247-A.

VICTOR VON ARX,

Plaintiff,

vs.

W. A. SCHAEFER and JOHN HANSON,

Defendants.

Writ of Error.

The President of the United States to the Honorable the Judges of the District Court of Alaska, Division Number One, Greeting:

Because in the record and proceedings as also in the rendition of the judgment upon a verdict, which is in the said District Court before you or some of you, wherein Victor Von Arx is plaintiff and W. A. Schaefer and John Hanson are defendants, a manifest error hath happened, to the great damage of the said Victor Von Arx, as by his petition appears,—

WE BEING WILLING that error, if any hath happened, should be corrected and speedy justice done to the parties in that behalf, do command you, if judgment be therein given, that then, under your hand and seal, distinctly and openly, you send the record and proceedings aforesaid, together with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the city of San Francisco, State of California, within thirty days from the date hereof, that the record

and proceedings aforesaid, being inspected, the said Appellate Court may cause further to be done therein to [103] correct that error, which of right and according to the laws and customs of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States and the Seal of the District Court for Alaska, this the 31st day of January in the year of our Lord one thousand nine hundred and fifteen.

J. W. BELL,
Clerk of the District Court for Alaska, Division
Number One.

Allowed by:

[Seal]

ROBERT W. JENNINGS,
District Judge.

Service of the above and foregoing Writ of Error is admitted to be duly made this the —— day of December, 1915.

Attorney for W. A. Schaefer and John Hanson.

Filed in the District Court, District of Alaska,
First Division. Jan. 31, 1916. J. W. Bell, Clerk.
By John T. Reed, Deputy. [104]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1247-A.

VICTOR VON ARX,

Plaintiff,

vs.

W. A. SCHAEFER and JOHN HANSON,

Defendants.

Bond.

KNOW ALL MEN BY THESE PRESENTS:
The we, Victor Von ARX, as principal, and Emery Valentine as surety, are held and firmly bound unto W. A. Shafer and John Hanson in the penal sum of two hundred and fifty (\$250) dollars, to the payment of which well and truly to be made we hereby bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such that whereas the above-named W. A. Shafer and John Hanson as defendants recovered a judgment against the above-named Victor Von Arx as plaintiff in the above-entitled and numbered cause, that the plaintiff take nothing by his action and that the defendants recover of the plaintiff their costs; and whereas the above bound Victor Von Arx is suing out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment;

NOW, THEREFORE, if the above-named Victor Von Arx as plaintiff in error shall prosecute said Writ of Error to effect and if he fails to make good his plea, shall answer all costs and damages, then this obligation shall be null and void, otherwise to remain in full force and effect.

WITNESS our hands this the 28th day of January, A. D. 1916.

VICTOR VON ARX,

By J. H. COBB,

His Attorney of Record.

EMERY VALENTINE.

Approved this the 31st day of January, A. D. 1916.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska,
First Division, Jan. 31, 1916. J. W. Bell, Clerk.
By John T. Reed, Deputy. [105]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1247-A.

VICTOR VON ARX,

Plaintiff,

vs.

W. A. SCHAEFER and JOHN HANSON,

Defendants.

Citation.

United States of America,—ss.

The President of the United States to W. A. Schaefer and John Hanson, and to Mr. Z. R. Cheney, their Attorney, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, State of California, within thirty days from the date of this writ pursuant to a writ of error filed in the clerk's office of the District Court for Alaska, Division Number One, in a case where Victor Von Arx is plaintiff and you are defendants in error, then and there to show cause if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States and the Seal of the District Court for Alaska, Division Number One, this the 31st day of January, 1916.

ROBERT W. JENNINGS,

Judge.

[Seal]

Attest: J. W. BELL,

Clerk [106]

Service of the above and foregoing Citation in Error admitted this the 31 day of December, 1915.

Z R. CHENEY,

Attorney for W. A. Schaefer and John Hanson.

Filed in the District Court, District of Alaska,
First Division. Jan. 31, 1915. J. W. Bell, Clerk.
By John T. Reed, Deputy. [106½]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1247-A.

VICTOR VON ARX,

Plaintiff,

vs.

W. A. SHAFER and JOHN HENSON,

Defendants.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court.

Kindly prepare and transmit to the Circuit Court
of Appeals for the Ninth Circuit copies of the fol-
lowing:

1. Complaint.
2. Amended Answer of Shafer.
3. Amended Answer of Henson.
4. Replies to Amended Answers.
5. Judgment.
6. Bill of Exceptions.
7. Assignment of Errors.
8. Writ of Error.
9. Bond.
10. Citation.

C. H. COBB,

Attorney for Plaintiff in Error.

Filed in the District Court, District of Alaska,
First Division. Aug. 21, 1916. J. W. Bell, Clerk.
By L. E. Spray, Deputy. [107]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

United States of America,
District of Alaska,
Division No. 1,—ss.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 107 pages of typewritten matter numbered from 1 to 107, both inclusive, constitute a full, true, and complete copy, and the whole thereof, prepared in accordance with the Praeceptum of the plaintiff and plaintiff in error on file herein and made a part hereof, in the cause wherein Victor Von Arx is plaintiff in error and W. A. Shafer and John Henson are defendants in error, No. 1247-A, as the same appears of record and on file in my office, and that the said record is by virtue of the Writ of Error and Citation issued in this cause and the return thereof in accordance therewith.

I do further certify that this transcript was prepared by me in my office, and the cost of preparation, examination, and certificate, amounting to \$44.85 has been paid to me by counsel for plaintiff in error.

IN WITNESS WHEREOF I have hereunto set

my hand and the seal of the above-entitled Court
this 21st day of August, 1916.

[Seal]

J. W. BELL,
Clerk.

By _____,
Deputy.

[Endorsed]: No. 2856. United States Circuit
Court of Appeals for the Ninth Circuit. Victor
Von Arx, Plaintiff in Error, vs. W. A. Shafer and
John Henson, Defendants in Error. Transcript of
Record. Upon Writ of Error to the United States
District Court of the District of Alaska, Division
No. 1.

Filed September 1, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

NO. 2856

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

VICTOR VON ARX

Plaintiff in Error,

vs.

W. A. SHAFER and JOHN HENSON,

Defendants in Error.

Brief of Plaintiff in Error

UPON WRIT OF ERROR TO THE DISTRICT
COURT FOR ALASKA, DIVISION
NUMBER ONE

J. H. COBB,
Attorney For Plaintiff in Error

BEATTIE, PRINTER, JUNEAU

Filed

FEB 21 1917

F. D. Monckton,
Clerk.

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

VICTOR VON ARX

Plaintiff in Error,

vs.

W. A. SHAFER and JOHN HENSON,

Defendants in Error.

Brief of Plaintiff in Error

UPON WRIT OF ERROR TO THE DISTRICT
COURT FOR ALASKA, DIVISION
NUMBER ONE

J. H. COBB,
Attorney For Plaintiff in Error.

STATEMENT OF THE CASE

Plaintiff in Error was plaintiff below, and defendants in Error were defendants, and will, for convenience be called plaintiff and defendants respectively.

W. A. Shafer was city marshal of Douglas, Alaska, and John Henson was city magistrate, on September 11th and 12th, 1914. On the 11th, Defendant Shafer, between whom and the plaintiff there was bad feeling, at about the hour of noon, went to a house owned by the plaintiff, in Douglas City, and attempted to enter. Shafer had no business of any kind there. Plaintiff asked him if he had any business there—"any paper" or other authority, and upon being answered in the negative, informed Shafer that he did not want him on his property, and that he could not enter the house. Shafer, however, attempted to force his way in. This resulted in a personal encounter between plaintiff and Shafer, with usual verbal combat on such occasions. Shafer appears to have gotten the worst of the encounter, and when bystanders pulled plaintiff off, Shafer drew and presented a pistol at plaintiff, pushed him with the muzzle of the pistol to the city jail, and locked him in. On the way to the

jail they passed the office of Defendant Henson, who was standing in the doorway. Plaintiff asked Shafer to take him at once before the City Magistrate, but he refused.

Shortly thereafter not later than 5 o'clock, John Feusi and Theodore Hunsaker went to Defendant Henson and asked for bail, and offered bail for plaintiff. They were known to the Defendant Henson to be men of property and qualified bondsmen. Henson was drunk and declined to accept bail. Plaintiff was kept in jail till 10 next day, without food, when he was taken before the magistrate, and he then asked the magistrate to await the arrival of his attorney at 11. He was returned to jail, and about one o'clock, for the first time a complaint was made against him by Defendant Shafer.

There was a sharp conflict in the evidence as to many of the details and even on crucial points in the case, but the above is a fair statement of the case made by the plaintiff.

At the conclusion of the plaintiff's case, the Court granted a motion for non-suit against Defendant Henson. (Trans. p. 48-49). To which plaintiff excepted. At the conclusion of the whole evidence the Court instructed a verdict for Defendant Shafer. (Trans. p. 104-5) to which the plaintiff excepted.

ASSIGNMENT OF ERRORS

I. The Court erred in granting the motion of the Defendant John Henson for a non-suit.

II. The Court erred in directing a verdict for the Defendant, W. A. Shafer.

(Trans. p. 106).

ARGUMENT

The Statutory law applicable to the case is as follows:

“That a peace officer may, without a warrant, arrest a person—

First: For a crime committed or attempted in his presence.

Second: When the person arrested has committed a felony, though not in his presence.

Third: When a felony has in fact been committed and he has reasonable cause for believing the person arrested to have committed it.”

Comp. Laws of Alaska, Sec. 2399.

Here no felony had been committed; and no crime was committed or attempted in the presence of the officer by plaintiff. In fact the only criminal conduct of any one at the time of the arrest was that of Shafer himself.

“That the defendant must in all cases be taken before the magistrate without delay.”

Comp. Laws of Alaska, Sec. 2389.

Here there was a delay of at least 24 hours during which time plaintiff was confined in jail without food.

“That when the defendant is brought before a magistrate upon an arrest, either with or without warrant, on a charge of having committed a crime, the magistrate must immediately inform him of the charges against and of his right to the aid of counsel before any further proceedings are had.”

Ib. Sec. 2408.

The next three sections provide for the giving of a reasonable time to secure counsel, if desired; that immediately after the appearance of counsel, or if none appear in a reasonable time, “the magistrate must proceed to examine the case”; and that the examination must be completed at one session, unless for good cause shown by affidavit, it be adjourned, and prohibits adjournments for more than one day unless by consent of the defendant.

It is apparent then that the law prohibits just what was done in this case, namely, arresting without warrant and confining the person so arrested in jail longer than reasonably necessary to take him before a magistrate for examination or trial.

“A failure to perform this duty imposes liability in false imprisonment for a trespass *ab initio*.”

19 Cyc. p. 354.

Low vs. Evans, 16 Ind., 487.

Stewart vs. Feeley, 118 Ind. 524, 92 N. W. 670.

Brock vs. Stimson, 108 Mass. 520.

Harness vs. Steele, 159 Ind. 286, 64 N. E. 878.

Lager vs. Warren, 62 Oh. St. 500, 51 L. R. A. 193, and note on pp. 216-217.

In Brock vs. Stimson, there was arrest without warrant, and about one hour detention only, and release without taking before magistrate. A judgment for \$300 was sustained, the opinion being written by Mr. Justice Gray, afterwards of the Supreme Court.

Low vs. Evans, is an instructive case. The defendant, a city marshal, arrested plaintiff for alleged drunkenness, and the Court not being in session that day, put him in jail intending to take him before the Court next day. Later plaintiff was released upon his promise to appear next day. Plaintiff did appear next day and plead guilty and paid a fine. It was held that defendant was liable because he did not take plaintiff before a magistrate. The Court said:

“If the power exists in the ministerial officer, to arrest on view, it is subject to the statutes of the State and to general and known principles of law. By these, it would be the duty of the officer to take the prisoner forth-

with before a tribunal having jurisdiction and prefer a complaint against him. Prisons do not fly open in this country at every touch of a mere ministerial officer, however worthy the motive may be that operate upon him; much less should they be made his sole control if he was subject to act wantonly or from an improper motive."

In that case the Court exonerated the officer from improper motives, but sustained the judgment against him. In this case the jury might well have found grossly improper motives.

In the case of *Harness vs. Steel*, the Court in speaking of the power of arrest without warrant, said:

"But the power of detaining the person so arrested, or restraining him of his liberty, in such a case is not a matter within the discretion of the officer making the arrest. He cannot legally hold the person arrested in custody for a longer period of time than is reasonably necessary, under all the circumstances of the case, to obtain a warrant or order for his further detention from some tribunal or officer authorized under the law to issue such a warrant or order. If the person arrested is detained or held by the officer for a longer period of time than is required, under the circumstances, without such warrant or authority,

he will have a cause of action for false imprisonment against the officer and all others by whom he has been unlawfully detained or held."

(Citing authorities).

"An officer arresting without a warrant cannot justify his action in holding or detaining the prisoner for an unreasonable time before obtaining a warrant upon the ground that such delay was necessary in order to investigate the case or procure evidence against the accused. A detention for such a purpose, if necessary, is properly within the jurisdiction of the justice of the peace or other judicial officer before whom he may be charged with committing the offense."

These authorities, we think, make it clear that there was a case—a strong case—made against Defendant Shafer.

V as Defendant Henson exempt? The exemptions for their official acts which the law extends to Judicial officers, applies to Justices of the Peace and City Magistrates only when they act within their jurisdiction and not when they are performing ministerial acts, or refuse to act where it is their plain duty to act.

We think that when Feusi and Hunsaker applied to Henson on behalf of plaintiff for bail on the afternoon of September 11th, the day of the

arrest, and Henson refused bail, thereby prolonging the illegal detention till the afternoon of the next day, he acted illegally and aided and abetted the illegal arrest and become a joint tortfeasor with Shafer.

19 Cyc. pp. 334-5.

We respectfully submit that the judgment should be reversed and a new trial granted.

J. H. COBB,

Attorney For Plaintiff in Error.

NO. 2856

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTOR VON ARX

Plaintiff in Error,

vs.

W. A. SHAFER and JOHN HENSON,

Defendants in Error.

Brief of Defendants in Error

UPON WRIT OF ERROR TO THE DISTRICT
COURT OF ALASKA, DIVISION
NUMBER ONE

CHENEY and ZIEGLER,
Attorneys for Defendants in Error

Filed

MAR 27 1917

F. D. Monckton,

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTOR VON ARX

Plaintiff in Error,

vs.

W. A. SHAFER and JOHN HENSON,

Defendants in Error.

Brief of Defendants in Error

UPON WRIT OF ERROR TO THE DISTRICT
COURT OF ALASKA, DIVISION
NUMBER ONE

CHENEY and ZIEGLER,
Attorneys for Defendants in Error

STATEMENT OF THE CASE

Counsel for the plaintiff has stated the case in his brief. His statement is not supported by the record therefore we feel compelled to make our own statement of what we contend the record shows.

We will refer to the Plaintiff in Error as Plaintiff and Defendants in Error as Defendants.

Plaintiff was a citizen of Douglas City, Alaska. Defendant W. A. Shafer was City Marshal and John Henson was City Magistrate. Plaintiff brought this action to recover damages from defendants alleging, among other things, that defendants entered into a conspiracy to injure plaintiff; that pursuant to such conspiracy Shafer went to plaintiff's house without a warrant and without official or other business of any kind. That he assaulted plaintiff with a revolver, and without any legal right to do so arrested plaintiff and confined him in the City Jail; that the arrest was made at eleven o'clock in the forenoon and the plaintiff was not taken before the magistrate before noon the next day. That plaintiff was refused bail; that the jail where the plaintiff was

confined was foul, dirty, ill kept and swarming with vermin; that plaintiff tendered bail which was refused: for all of which plaintiff prayed judgment in the sum of \$1,000 and for exemplary damages in the sum of \$1,000.

Defendants answered admitting their official positions and the arrest of the plaintiff; denied all the remaining allegations of the complainant and, as an affirmative defense, alleged that plaintiff had committed a misdemeanor in violation of Sec. 15, Ord. 39 of the City of Douglas by then and there using profane and obscene language on the street; that the crime was committed in view of the defendant Shafer, who was the officer making the arrest; that defendant Shafer placed plaintiff in the City Jail where he remained until ten o'clock the following morning when he was taken before the city magistrate, was tried and found guilty of the crime of using profane and obscene language in the public street.

Plaintiff replied to defendants' answer by restating his whole case and admitting the trial and judgment of conviction.

Upon these pleadings the case was tried; at the close of plaintiff's case the Court granted a nonsuit as to defendant Henson, and, at the close of all

the evidence the Court granted a motion for a directed verdict in favor of the defendant Shafer. Plaintiff sued out this writ of error to reverse the rulings of the trial court.

That the court was right in granting the non-suit as to defendant Henson, the City Magistrate, is so apparent from the record that we will not take the time of this court in discussing the question in our brief, but will base our statement of facts upon all the evidence in the case.

The evidence shows that the plaintiff owned a house in Douglas City which had been occupied by one Hunsucker for the past eight years; that on or about December 11, 1914, Hunsucker killed his wife and another man and then went into the house, locked the door and killed himself. The Coroner went to the house in company with the U. S. Marshal and the City Marshal (the defendant Shafer), secured a jury, held an inquest, removed the remains, locked up the house and left it in charge of the U. S. Marshal. The U. S. Marshal turned the custody of the house over to Shafer, the City Marshal, with instructions to open the house when requested to do so by the brother of the deceased. The brother of the deceased came to Douglas and requested the City Marshal to go with him to the

house to examine the effects of the deceased. The house was locked and plaintiff was called to assist in opening the door. Plaintiff was standing in the door, defendant Shafer was standing on the sidewalk when plaintiff called him a G—D—S—of—B and other vile and obscene names. A large crowd of citizens gathered. Plaintiff struck defendant Shafer, knocking him down in the muddy street. Plaintiff was pulled off by the bystanders. Defendant Shafer then arrested plaintiff and took him to the City Jail. This was about one o'clock P. M. Plaintiff was arrested in the Indian Village in what is known as the Beach, located quite a distance from the jail. in going up town they reached the jail first. That is, to say the jail was one hundred and fifty feet nearer to the Indian Village than was the magistrate's office. Defendant Shafer left plaintiff at the jail and went to his home, which was in the opposite part of the city, quite a long distance away. The officer washed up, changed his clothing, ate his lunch which he had left untouched at noon time, took his dirty uniform to the cleaners. It was then about two o'clock in the afternoon. The officer then went back to the Beach where he had made the arrest, to search for some of the persons who were present and had witnessed the affray. At four o'clock he re-

turned and went to the office of the magistrate to file complaint against the plaintiff. John Henson, the magistrate, was not in his office and did not return to his office again that afternoon. The magistrate was ill in the afternoon and had gone to his own home. The defendant Shafer provided the plaintiff with a bed in the jail and provided him with drinking water. Defendant's evidence also shows that he provided plaintiff with sufficient food. This is disputed by the plaintiff. At ten o'clock the following morning defendant Shafer took plaintiff to the office of the magistrate and lodged a complaint against him. Plaintiff stated that he was not ready for trial but asked for a continuance until his attorney should arrive. The continuance was granted until one o'clock, at which time plaintiff was again brought into court, was tried and convicted.

The evidence further showed that it was the custom of the city magistrate to be at his office from nine o'clock until five o'clock but that the magistrate was engaged in other business which occupied his attention in the afternoons. That it was the custom of the magistrate to hear Criminal cases in the forenoons.

ARGUMENT

In our view of the case the only question for determination upon this writ of error is this: Is there sufficient evidence to go to the jury upon the question as to whether or not the defendant Shafer was justified in keeping plaintiff confined in the jail from one o'clock in the afternoon until ten o'clock in the morning of the next day.

Before discussing the cases cited by counsel on page seven of his Brief we desire to direct attention to Sec. 2389 of the Compiled Laws of Alaska, reading as follows: "That the defendant must in all cases be taken before the magistrate without delay," and to the fact that this section is found in our code under the title, "Of the warrant of arrest," being chapter thirty-two of the Compiled Laws. The whole chapter deals with the procedure where a complaint is made to the magistrate and a warrant issued. In *State vs. Belding*, 71, Pac. 330, the Supreme Court of Oregon construed Sec. 2389 as being not mandatory but directory only. The instant case does not come under chapter thirty-two entitled, "Of the warrant of arrest." The chapter in which Sec. 2389 is found is not the procedure applicable

to the case at bar. This case comes under chapter thirty-three of the Compiled Laws entitled, "Of the arrest, how and by whom made." Sec. 2390 of Chapter thirty-three provides, "That arrest is the taking of a person into custody that he may be held to answer for a crime." Sec. 2391, "That the arrest may be made either,

- 1st. By peace officer under warrant,
- 2nd. By peace officer without a warrant.
- 3rd. By a private person."

Sec. 2404 provides, "That a private person may arrest for a cause specified in Sec. 2329 of this title in like manner and with like effect as a peace officer without a warrant." Sec. 2405, "That a private person who has arrested another for the commission of a crime must without unnecessary delay take him before a magistrate or deliver him to a peace officer."

There being no express provision as to what shall be done in case an officer arrests a person without a warrant it would seem that Sec. 2405 would apply to such a case instead of Sec. 2389. In other words we contend that an officer arresting without a warrant is required to take the person arrested before a magistrate without unnecessary delay.

The only cases cited by counsel are from Indi-

ana, Mass., and Ohio. Taking up the cases in the order found on page seven of Counsel's Brief, we find that none of the cases cited are exactly in point.

Low vs. Evans, 16, Ind. 486.

This case arose in Lafayette, Indiana, tried May term, 1861, Supreme Court of Indiana.

Low sued Evans for false imprisonment and averred that without lawful authority he seized the plaintiff, took from him \$15.00, his tobacco, pen-knife and handkerchief, and caused him to be confined in jail twelve hours. Defendant answered, setting up that he was City Marshal, and as such, on view arrested plaintiff for violating city ordinances, also alleged that he arrested the defendant on Sunday; that the city court was not in session; that he put him in jail intending to bring him before the mayor on the following day but released him on promises that he would appear; that he afterwards appeared, plead guilty and was fined. There was a demurrer to the answer. The Court say:

“It will be observed that the statute speaks of penalties and forfeitures in connection with the violation of by-laws and ordinances of the city, while the ordinances passed by the city of Lafayette prescribe fines, nevertheless the form pursued in recovering the same is in the nature

of a suit for the recovery of a penalty or forfeiture. We are referred to the case of *Van Deever vs. Mattox*, 3 Ind., 479, but the difference between that case and the case at bar is that there *Van Deever* was arrested by *Mattox*, a constable, for disturbing a religious society in his view; for being guilty of a misdemeanor forbidden by statute and for which he was liable for prosecution in the name of the state. In this case there is no statute making drunkenness a crime or misdemeanor. The act was an offense against the city ordinances for which the statute prescribes that a forfeiture or penalty might be recovered in suit of law.

“We are at a loss to see any authority for thus imprisoning a man for an uncertain time because he may be subject to a penalty to be recovered by an action in the nature of an action of debt; the demurrer should have been sustained.”

In *Van Deever vs. Mattox*. The Court say:—

“We think the demurrer to the plea was correctly overruled. A constable has authority as a conservator of the peace to arrest a person for a breach of the peace committed within his view and to detain the offender for a reasonable time for the purpose of taking him before a magistrate. The circumstances stated in the

plea fully justify the detention for the rest of the time stated. Judgment was affirmed with costs.”

In the above case the constable arrested plaintiff for disturbing a religious meeting, placed him in jail for one and a half hours.

Stewart vs. Feeley, 118 Ind.

This case was reversed in the Supreme Court solely upon the grounds of erroneous instructions given by the trial court. The facts show that the officer made an arrest without a warrant and afterwards discharged the defendant without having taken him before a magistrate. The court holds that in such a case the officer becomes a trespasser ab initio. All of the decisions are to this effect. An officer is not permitted to arrest a man without a warrant and then discharge him without taking him before a magistrate. It is the officer's duty to take the arrested person before a magistrate in all cases, but when the officer has performed that duty, provided he is justified in making the arrest in the first instance, his duty has been fulfilled and he is not liable.

Brock vs. Stimson 108, Mass. 420.

This case was decided by the Supreme Court of

Mass., in November, 1871. It arose at Cambridge. Action for assault and battery and false imprisonment. Defendant pleaded that he arrested plaintiff for being drunk and disorderly and detained him a short time in prison. Plaintiff recovered verdict for \$300.00. The evidence showed that the plaintiff was arrested without a warrant and that the defendant after detaining him in custody for the space of one hour, released him therefrom and took no further proceedings in the premises.

In this decision the court used the following language:

“The defendant as his bill of exceptions and his own answer both show, having failed to do this (taking the arrested person before the magistrate) cannot justify the arrest, and, his unauthorized discharge of the prisoner affords him no protection from liability in this action.”

Harness vs. Steele, 159 Ind.

This case was one where the defendant arrested a boy fourteen years old without a warrant for the supposed theft of a watch and detained him in jail without taking any steps to file complaint against him.

The Indiana statute provided that the detention should only continue until a legal warrant can be obtained.

It is true the court in its opinion used this language: "An officer arresting without a warrant cannot justify his action in holding or detaining the prisoner for an UNREASONABLE time before obtaining a warrant upon the ground that such delay was necessary in order to investigate the case and procure evidence against the accused." In the case at bar the officer did not need to investigate the case to determine whether a crime had been committed, he was painfully aware of the fact, and his journey to the place of arrest in an attempt to procure the witnesses was intended to facilitate the trial of the plaintiff instead of delaying it.

Lager vs. Warren, 62, Ohio St.

The facts in this case show that plaintiff was arrested at his home by three policemen, taken to jail and kept there from Jan. 19th to Jan. 25th; plaintiff was detained in custody for more than five days without any warrant for his arrest and without any charge having been made against him and without opportunity for trial. After five days he was discharged from prison. The facts were not dis-

puted. He recovered \$1,000 damages. The court used the following language, "Not having pursued their authority to arrest without a warrant by failing to obtain within a reasonable time a writ or order for the plaintiff's detention, the defendants placed themselves in the same situation as if they had acted originally without authority. It is a familiar rule that one who abuses an authority given him by law becomes a trespasser ab-initio. That rule has often been applied in cases like the present one." The case of Brock vs. Stimson, 108, Mass., was cited in the above case. Further it appeared that the revised statutes of Ohio provided that the prisoner could not be detained under such circumstances to exceed four days. The detention exceeded five days. That fact alone made out a case for the plaintiff.

A careful reading of the authorities cited by counsel shows that they are not on all fours with the case at bar.

Conceding that it was the duty of the defendant Shafer to take the plaintiff before the magistrate without unnecessary delay the question arises as to whether or not the evidence offered by the defendants was sufficient justification for the delay which occurred. The undisputed evidence shows

that the defendant was justified in making the arrest. It further shows that he was assaulted and beaten by the plaintiff; that he was knocked down in the muddy street; that his clothes were soiled so badly that it was necessary for him to take them to the cleaners. After taking his clothes to the cleaners, defendant Shafer went immediately to the Beach to find the persons who had witnessed the fight between plaintiff and defendant. It was then about two o'clock in the afternoon. As soon as defendant returned to town he went to the office of the magistrate for the purpose of filing a complaint against defendant. It was then about four o'clock. The magistrate was not at his office, but had been taken ill and had gone to his home. He did not return to his office that afternoon.

The only delay which could possibly be called unnecessary or unreasonable was the two hours occupied by Shafer in making the trip to the Beach in search of witnesses. It is a well known fact that the average citizen dislikes to be subpoenaed as a witness to a street brawl. The record also shows that the persons who witnessed the affray were nearly all Indians or foreigners. The officer, no doubt thought that unless he secured the witnesses that day he might not be able to locate them there-

after. There is nothing to indicate that the defendant was guilty of anything more than an error of judgment.

We respectfully submit that the rulings of the trial court should be affirmed.

CHENEY & ZIEGLER,
Attorneys for Defendants in Error.

